

No. 12324

United States
Court of Appeals
for the Ninth Circuit.

AUDREY CUTTING and SYLVIA A. HENDER-
SON,

Appellant,

vs.

RAY BULLERDICK, et al,

Appellees.

Transcript of Record
In Three Volumes
Volume III
(Pages 239 to 577)

Appeal from the District Court for the
Territory of Alaska,
Third Division

FILED

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Appeal from the District Court for the
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In the United States District Court for the
Territory of Alaska, Third Division

No. A-5087.

No. A-5088.

Nos. A-5087 and A-5088.

Before: The Honorable Anthony J. Dimond,
United States District Judge.

Tuesday, February 8, 1949.

Appearances:

GEORGE B. GRIGSBY,

Attorney at Law, Anchorage, Alaska, appearing for Ray Bullerdick, et al., plaintiffs in cause No. A-5087, Ted Van Thiel, et al., copartners as Brady's Floor Covering. E. V. Fritts, et al., copartners as Alaska Paint and Glass Company; and City Electric of Anchorage, Inc., a corporation, plaintiffs in cause No. A-5088 and the intervenors, Ted Van Thiel, et al., copartners as Kennedy Hardware.

J. L. McCARREY, Jr.,

Attorney at Law, Anchorage, Alaska, appearing for intervenors, Arthur F. Waldron, et al., copartners as Anchorage Sand and Gravel Company.

WENDELL P. KAY,

Attorney at Law, Anchorage, Alaska, appearing for intervenors Ketchikan Spruce Mills, Inc., a corporation, and Alaskan Plumbing and Heating Company, Inc., a corporation.

HERALD E. STRINGER,

Attorney at Law, Anchorage, Alaska, appearing in the capacity of intervenor as Trustee for the Estate of Russell W. Smith, Bankrupt.

EDWARD V. DAVIS and

PAUL F. ROBISON,

Attorneys at Law, Anchorage, Alaska, appearing for intervenors, Ken Hinchey and Nadine Hinchey, copartners as Ken Hinchey Company; intervenors Ray Wolfe, Esther Wolfe, et al., copartners as Wolfe Hardware and Furniture.

HAROLD J. BUTCHER,

Attorney at Law, Anchorage, Alaska, appearing for the defendants, Audrey Cutting, and Sylvia A. Henderson, a minor.

(No appearance was made by the defendant Ralph R. Thomas in person or by attorney.)

(Whereupon, at 2 o'clock, p.m., Tuesday, February 8, 1949, the above-entitled matter came on for hearing.)

PROCEEDINGS

The Court: This is the time set for trial of the consolidated cases A-5087 and A-5088. Pursuant to stipulation of counsel made previously in Court, Mrs. Catherine Parsons has been appointed Special Court Reporter for this case.

I have read all the pleadings and those which were filed today, this includes an amended answer to the complaint in intervention made by defendant Audrey Cutting and also answering for her minor daughter Sylvia Henderson. I have read the answer of Ken Hinchey and Nadine Hinchey doing business as Ken Hinchey Company.

Mr. Davis: Your Honor, if you have read the previous answers it is identical with the others except as to the amounts.

The Court: Mr. Hinchey is not present in Court?

Mr. Davis: He will be here in a minute or two.

Mr. Grigsby: If it please, Your Honor, let's proceed with this case. I would suggest, Your Honor, that the counsel who are present representing the various parties might be able to save some time if they were to stipulate as to facts, thus eliminating the necessity of calling a great number of witnesses.

Mr. Davis: If the Court please, before going further, I said I had filed Exhibit "W," as a mat-

ter of fact I did not file that and have it here. I have attached it to the copies [5*] for the other parties, however.

The Court: You may attach it.

Mr. Davis: This is the answer in cross-complaint of Wolfe Hardware and Furniture.

The Court: Which case was it filed in?

Mr. Davis: A-5087, I believe.

The Court: In looking over the pleadings I notice that no where is Sylvia A. Henderson named as a party.

Mr. Davis: It is my recollection that in a pleading filed by Mr. McCarrey that Sylvia A. Henderson's name was indicated as the defendant and her name appears in the title of the case about five lines up from the bottom of the page.

The Court: Court will stand in recess for 10 minutes.

(Short recess.)

The Court: Mr. Davis.

Mr. Davis: If it please the Court, we have agreed on certain facts to which we can stipulate. It is stipulated between the plaintiffs represented by George Grigsby and the plaintiffs in intervention represented by McCarrey and the plaintiffs in the second suit—Brady's Floor Covering, Alaska Paint and Glass Company, and City Electric of Anchorage, represented by Mr. Grigsby, and the defendants in intervention Wolfe Hardware and Furniture, Ken Hinchey Company, represented by

* Page numbering appearing at top of page of original Reporter's Transcript.

Edward V. Davis, and the defendant Russell Smith, through his attorneys as Trustee in Bankruptcy, Mr. Stringer and Mr. [6] Dimond, and the defendant Audrey Cutting. I believe that is all of the parties represented here.

Mr. Kay: No, it isn't.

Mr. Davis: I have left out a couple—Alaska Plumbing and Heating and Ketchikan Spruce Mills, represented by Mr. Kay, also plaintiffs in intervention.

The Court: Do they embrace all of the parties?

Mr. Davis: I believe it does, Your Honor. It is stipulated at this point by all the parties that the property in question in these two suits is lot 2, block 37-D, South Addition, to the original town-site according to the Welch Subdivision and according to the map and plat of such subdivision on file and of record in the office of the United States Commissioner and ex-officio recorder for Anchorage precinct at Anchorage, Alaska, and that until August 1st, 1948 the record owner of that property was Ralph Russell Thomas and that Ralph Russell Thomas is the same person as the Ralph R. Thomas, and on August 1st, 1948 a deed was recorded from Ralph R. Thomas to Sylvia A. Henderson and that deed having been executed on the 30th day of November, 1946 and conveying to Sylvia A. Henderson the property here in question and that since the 4th day of August, 1948, Sylvia A. Henderson has been the record owner of the property in question.

It is stipulated by the parties that a contract was

made by Audrey Cutting or possibly by Audrey Henderson Cutting with one, Russell Smith, by the terms of which Mr. Smith agreed [7] to construct a building on the real property previously described.

The Court: Was this contract in writing?

Mr. Davis: The contract was in writing, Your Honor. It is stipulated by all the parties, Your Honor, that the various lien claimants have all recorded lien claims against this property with the United States Commissioner at Anchorage, Alaska, and that this property lies within the Anchorage Recording Precinct.

It is stipulated by all the lien claimants, as distinguished from the defendants, that lien claims of the various parties as filed are true. Mr. Butcher has not joined in that particular part of the stipulation with the other parties but Mr. Butcher on behalf of the defendants Audrey Cutting and Sylvia Henderson has stipulated that the lien claims of each of the lien claimants have been filed *with* the time limited by law subject to the exception that if any lien claims should appear during the course of the proceedings not filed within the time then that lien claim will be withdrawn.

Mr. Butcher: Mr. Davis, would you repeat that part about the lien claims? I believe I missed this.

Mr. Davis: Stipulation that defendants will stipulate that each and all of the lien claims filed by the various claimants were filed in accordance with the law and within the time allowed by law unless during the course of the trial it should [8] be dis-

covered that they were not filed in time, in which event the claimant who didn't file in time withdraws his lien from the proceedings.

Mr. Grigsby: I think Mr. McCarrey desires to call his witness at this time.

Mr. McCarrey: I represent the Anchorage Sand and Gravel Company and the Cinder Concrete Products Company, and at this time I would like to call Mr. Waldron.

The Court: As to the characteristics of the parties, has it been discussed with their partnership or whatever they claim to be?

Mr. Davis: That hasn't been discussed, Your Honor.

Mr. Butcher: I will stipulate that each of the parties are either as described and individually a partnership or corporation.

Mr. Kay: It is further stipulated that the corporations have filed their reports last due.

Mr. Butcher: I will not stipulate to that point. My objection is that it hadn't occurred to me that there were any corporations involved. However, I will stipulate to them. I will so stipulate to those of the City Electric, Alaska Plumbing and Heating, this including all corporations.

Mr. Kay: It is stipulated then that the corporations which are parties to this action and each and all of them have paid their license fees and whatever other requirements are [9] needed in the case of corporations.

Mr. McCarrey: Is it necessary to prove the partnerships?

Mr. Butcher: No.

ARTHUR F. WALDRON

called as a witness herein, being first duly sworn, testified as follows:

Direct Examination

By Mr. McCarrey:

Q. Your name is Arthur F. Waldron?

A. It is.

Q. You reside in the City of Anchorage?

A. Yes.

Q. At all times your name of Arthur F. Waldron is the person whose name appears in the liens and complaint in intervention? A. Yes.

Q. Also, I ask that you identify this?

A. I identify this as a copy of the lien filed for Cinder Products.

Q. Your signature appears on the lien and were you authorized to act in the capacity of partners?

A. I was.

Mr. McCarrey: That is the original, Your Honor. That is the original filed by the Cinder Products and filed in the United States Commissioner's office.

Q. Can you state the page? [10]

A. Page 57 in the United States Commissioner's office and appears at book No. 70.

Q. For what purpose was that lien filed, Mr. Waldron?

A. That was for materials delivered to the—

(Testimony of Arthur F. Waldron.)

furnished to the residence. I don't recall the exact address on that.

Q. Do you have any recollection of it?

A. Yes, I believe it was 410 "H" Street.

Q. What were those materials that you did furnish?

A. Those materials were building blocks and cinder.

Q. And on what dates?

A. The 10th day of May and 18th.

Q. Do you recall who ordered these materials?

A. Russell Smith was the one who ordered them.

Q. Did you give credit to Russell Smith?

A. I did not. We notified Audrey Cutting that we would not deliver until guarantee of payment was received and which we were given verbally.

Q. I ask can you identify this instrument?

A. This is an assignment of material lien from the Cinder Concrete Products Company to Anchorage Sand and Gravel Company.

Mr. McCarrey: I would like to offer this in evidence.

The Court: Is there objection?

Mr. Butcher: No objection.

The Court: It may be admitted in evidence and marked Intervenor's Exhibit "A." [11]

Mr. McCarrey: We would like, Your Honor, for the assignment to appear as Exhibit "A" and the lien as Exhibit "B."

The Court: The lien will be marked Exhibit

(Testimony of Arthur F. Waldron.)

“B” and the Assignment will be marked Exhibit “A” as requested by counsel.

Q. (By Mr. McCarrey): Can you identify this, Mr. Waldron?

A. I can. It is a lien placed by the Anchorage Sand and Gravel.

Q. Under whose signature?

A. Arthur F. Waldron.

Q. For what purpose?

A. That was for materials delivered to 410 “H” Street by the Anchorage Sand and Gravel Company.

Q. At whose request were those materials delivered?

A. They are delivered to Russell Smith under authority of Audrey Cutting.

Q. Did you give credit to Mr. Smith?

A. I did not. The credit was given to Audrey Cutting.

Q. What is the sum set forth in the lien as being unpaid? A. \$377.61.

Q. What did you furnish?

A. We furnished concrete, cinder and some concrete sealer.

Q. Were you ever paid for the materials furnished by the Cinder Products Company?

A. No, we have never been paid for that even.

Mr. McCarrey: Your Honor, we offer this lien as Intervenor’s Exhibit “C.”

Mr. Butcher: No objection.

(Testimony of Arthur F. Waldron.)

Mr. McCarrey: That is all I have, Your Honor.

Mr. Butcher: May I have the exhibits, Your Honor?

Cross-Examination

By Mr. Butcher:

Q. Mr. Waldron, I would like to question you briefly relative to the furnishing of the material in the case of the Cinder Products Company which was ordered by Mr. Russell Smith. This order was placed by Mr. Smith?

A. I believe that is correct, yes. It was ordered and Mr. Jack Harrison took the order on that.

Q. And when did it first come to your attention that such an order was placed?

A. Came to my attention when Russell—when I contacted Mr. Smith to furnish me an authorization from Mrs. Cutting before I delivered the materials.

Q. Who called Audrey Cutting?

A. I personally went to the office twice and talked to her personally before delivering the material.

Q. Did you not say that you called Audrey Cutting on the Cinder Concrete Products and talked to her about it?

A. I did not, but Mr. Jack Harrison had talked to her before he made delivery, as I instructed him to do. [13]

Q. What Mr. Harrison said to you is hearsay and is not admissible.

Q. You did not talk to Audrey at any time and say you would not give credit?

(Testimony of Arthur F. Waldron.)

A. I did not.

Q. Did you handle the billing for the sale?

A. At the time the original billing was mailed I did not.

Q. Do you have copies? A. I have copies.

Q. Do you know who the bills went to?

A. I am not positive of that.

Q. You didn't know whether the bills were made to Audrey Cutting or Russell Smith?

A. I did not.

Q. You really don't know, do you?

A. I do not.

Q. Do you happen to know who received delivery of the materials from the Cinder Product Company? A. I do not.

Q. You don't know whether it was Cutting or Smith? A. I do not.

Mr. Butcher: Your Honor, in connection with the Cinder Block Product Company, I am anxious to determine the full history of it and if a second contract was made I would like to know by showing of the papers on this case. [14]

The Court: Can you furnish such documents?

Mr. McCarrey: I think I can, Your Honor. I was going to suggest that we get Mr. Harrison to come to testify personally. I can get him in 15 or 20 minutes.

Q. (By Mr. Butcher): Was this a matter that Mr. Smith dealt with you?

A. This is a matter which Mr. Smith dealt with

(Testimony of Arthur F. Waldron.)

us personally. He came to the office and told me he was planning to build the building for Audrey Cutting.

Q. Did he say he had a contract?

A. I don't believe he did.

Q. He informed you that he intended to build it of cinder block or did that enter into later discussion?

A. It did not.

Q. Did you at any time endeavor to determine who was the true owner of the property?

A. I did not.

Q. Did you take Mr. Smith's word for it that he had a contract?

A. No, I took Audrey Cutting's word for it.

Q. At a later time you talked to Audrey Cutting?

A. Yes, at a later time.

Q. Did you question her about his credit?

A. No, I didn't.

Q. Did you ask her if his credit was any good?

A. No, I told her I would not give him any credit.

Q. Did you ask Cutting if she had a contract with Smith?

A. I did not. I just looked to her for payment of all the materials that he ordered.

Q. What did she say?

A. She said that it was all right and to go ahead and make the deliveries and she would take care of the payments.

Q. You don't recall that Mr. Smith had a signed

(Testimony of Arthur F. Waldron.)

contract and that she would be obligated to pay him when the building was completed?

A. I don't remember that.

Q. Do you know who receipted for delivery in connection with the materials furnished for the Audrey Cutting job?

A. Russell W. Smith in all cases, I believe.

Q. Then as far as the delivery was concerned you dealt with Mr. Smith? A. We did.

Q. You didn't believe it possible then that Mr. Smith had a contract to build?

A. I knew he was in charge of the construction and that is as far as I knew of it.

Mr. Butcher: That is all, Your Honor.

Re-direct Examination

By Mr. Grigsby:

Q. Did Audrey Cutting hold herself out to you as the owner [16] of the premises?

A. That was the impression I got from the conversations.

Q. You understood, then, that she was the owner? A. I did.

Q. Did Mr. Smith ever tell you?

A. Well, he told me he was building the house for Audrey Cutting.

Mr. McCarrey: I would like to reserve the right to call Mr. Harrison in support of Mr. Waldron's testimony.

(Witness excused.)

AUDREY HENDERSON CUTTING

called as a witness herein, being first duly sworn,
testified as follows:

Direct Examination

By Mr. Grigsby:

Q. State your name, please?

A. Audrey Henderson Cutting.

Q. And you are one of the defendants in this
action? A. I believe so.

Q. Mrs. Cutting, did you make a contract with
Russell W. Smith to build a house on lot 2, block
37-D of the South Addition of the City of Anchor-
age? A. That is correct.

Q. Have you your copy of the contract?

A. Yes. [17]

Q. Is it here and may I see it?

Mr. Butcher: Her copy is in my office.

Q. (By Mr. Grigsby): Is this the contract you
entered into with Russell Smith for that building?

A. I believe so.

Q. Is that your signature?

A. That is my signature.

Q. I just want to call your attention to this
agreement made the 30th day of——

Mr. Butcher: I believe in connection with the
document that I have a right to see the document
first, please.

The Court: Counsel may proceed.

Mr. Grigsby: I want to offer in evidence con-

(Testimony of Audrey Henderson Cutting.)

tract which she signed. And, then, reading from the contract "This agreement made the 30th day of April, 1948 by and between Russell W. Smith, an independent contractor, doing business at Anchorage, Alaska, hereinafter called the contractor, and Audrey Cutting, hereinafter called the owner. Whereas, the owner is the owner of lot 2, block 37-D, South Addition to the original townsite of Anchorage * * *" I want to ask you, Mrs. Cutting, this contract purporting to be signed on the 30th day of April, were you at that time the owner?

A. It would depend on how you would look at it. I bought the lot for my minor daughter; as the guardian I would be the owner. [18]

Q. But in dealing with the various people, including this contractor Smith and the people who furnished materials for that building, did you represent yourself as owner?

A. I was representing both myself and my daughter.

Q. Prior to the construction of that building, did you apply for a building permit from the City?

A. I believe Mr. Smith applied for the building permit.

Q. You have seen it? A. Yes.

Q. You were designated as owner?

A. That is correct.

Q. You were at that time the reputed owner as far as the job was concerned? A. Yes.

Q. But you daughter was the real owner?

(Testimony of Audrey Henderson Cutting.)

A. That is correct and I was her guardian.

Q. And in your answer you state in paragraph 1 you admit that you are the owner of certain real property situated in Anchorage, Alaska and particularly described as follows: —and then the lot is described as lot 2 of block 37-D, South Addition, of the original townsite of Anchorage?

A. That is true.

Q. And for all purposes you were what is considered as the owner of the property?

A. That is correct. [19]

Mr. Grigsby: That is all.

Q. (By Mr. Kay): Mrs. Cutting, in paying for this lot did you pay for it on a so-called real estate contract? A. Yes.

Q. That was a contract with Ralph Russell Thomas? A. That is correct.

Q. Do you have a copy of that contract?

A. I believe there is a copy in the Union Bank.

Q. Was the deed placed in escrow in connection with that contract? A. That is correct.

Q. Could you state whether that is a contract between you and Mr. Thomas or how was it?

A. The contract was between my daughter and Mr. Thomas.

Q. And was it signed by you? A. No.

Q. It is your testimony that a deed is placed in the Union Bank, do you have a copy?

A. No, I do not.

(Testimony of Audrey Henderson Cutting.)

Cross-Examination

By Mr. Butcher:

Q. Mrs. Cutting, do you recall whether you picked up the contract? [20]

A. I do believe I have it but I don't know just where it might be in my personal possessions.

Redirect Examination

By Mr. Kay:

Q. When the contract was signed was there any question as to a minor signing the contract?

A. No.

Q. Who drew the contract?

A. Mr. McCutcheon and Mr. Nesbett.

Q. And your daughter came in and signed it in their presence? A. That is correct.

Q. And your signature does not appear on it any place?

A. No, it doesn't; as I remember it doesn't.

Q. Can you produce a copy of the contract?

A. At my first opportunity I will try to find the contract and bring it here.

Mr. Dimond: Your Honor, at this time I would like to introduce this contract in evidence between Russell Smith and Audrey Cutting.

Mr. Butcher: No objection.

Mr. Dimond: I would like to have it marked as Defendant Russell Smith's Exhibit No. 1.

Q. (By Mr. Dimond): Mrs. Cutting, you have admitted you entered into a written contract between yourself and Russell Smith? [21]

(Testimony of Audrey Henderson Cutting.)

A. Yes, that is correct.

Q. Did he complete the work? A. Yes.

Q. Did you ever pay him for it? A. No.

Q. Have you ever promised to pay him for it since the completion of the house?

A. Yes. Mr. Smith was well aware of the fact that I intended to pay him but he presented his bill for services in the amount of \$13,500. The contract was for \$9,800.

Mr. Kay: Your Honor, in the answer filed and sworn to by Mrs. Cutting they have admitted owing the money. May I read the answer to the complaint in intervention, Your Honor?

The Court: If you wish to ask a question, you may.

Mr. Butcher: It is the answer to the complaint in intervention, Your Honor, which was filed by myself while Mrs. Cutting was in California and I believe I made a mistake.

Q. (By Mr. Kay): Did you ever promise to pay Mr. Smith the amount of \$10,500?

A. No, I did not.

Q. Did you accept the house from him after completion?

A. Well, there wasn't anything else that I could do.

Q. Did you accept it?

A. I haven't received all the house keys and there was certain work that Mr. Smith was to do.

Q. Isn't it true that you rented the house?

(Testimony of Audrey Henderson Cutting.)

A. That is correct.

Recross-Examination

By Mr. Butcher:

Q. Did you have any conversation with Mr. Smith as to the unfinished work?

A. That is correct. Just before he finished the house the basement leaked and, of course, the discussions on the contract and his statements that it was supposed to be waterproof, and then leaked. He was going to fix this. And then certain doors in the place didn't close.

Q. Did you call these defects in the construction to his attention? A. That is correct.

Q. What did he say?

A. It seemed that Mr. Smith had subcontracts with the Alaskan Plumbing and Heating Company.

Q. Did he say that he would take care of it?

A. Yes, if it were possible he would.

Q. Was it at that time that he presented you with the bills? A. Yes.

Q. What was the amount of that bill?

A. \$13,500.

Q. Did you tell him that you wouldn't pay him that much? A. That is correct. [23]

The Court: Did you actually pay Mr. Smith anything?

The Witness: Not anything. That was the terms of the contract.

(Testimony of Audrey Henderson Cutting.)

Q. (By Mr. Butcher): The house was to be completed to your satisfaction, was it not?

A. That is quite right.

Q. Did Mr. Smith ever agree to accept \$9800?

A. No, because he was obligated to pay out the sum of \$13,500 to various laborers and business people.

Q. Is there any explanation for this?

A. He explained that it cost him more than he had estimated.

Q. At any time during the construction did he tell you it cost more? A. No.

The Court: What is the size of your house?

The Witness: 21 by 31, four rooms, two bedrooms, front room, kitchen, bath room and basement.

The Court: The original contract price was \$9800?

The Witness: That is correct.

Further Redirect Examination

By Mr. Stringer:

Q. Did Mr. Smith have any discussion with you about a porch?

A. Yes, he explained to me that the FHA would not okeh a loan on the place unless there was a porch covering the basement [24] entrance and I asked Mr. Smith how much that would cost and he said around but not over \$200 and I said as long as the contract doesn't go over \$10,000 that will be all

(Testimony of Audrey Henderson Cutting.)

right but I don't want it any more than \$10,000.

Q. (By Mr. Dimond): Isn't it true, Mrs. Cutting, that this was a verbal contract about the porch not being more than \$200?

A. It was added expense and I didn't—

Q. Just answer my question—Wasn't it a verbal agreement? A. Yes.

Q. Was the porch actually put on?

A. Yes, it was.

The Court: Did you ever tender any money to Mr. Smith in payment for his services under this contract? A. No.

Q. Never gave him any money at all?

A. No.

Q. Did you ever offer to give him any money?

A. No.

Q. (By Mr. Grigsby): You have possession of those premises now? A. That is right.

Q. They are occupied by Al Fox?

A. That is correct.

Q. You are getting the rent? [25]

A. That is correct.

Mr. Grigsby: No further questions.

Mr. Butcher: I have a question in connection with the \$2500 she agreed to pay.

Further Recross-Examination

By Mr. Butcher:

Q. Did you talk with the FHA people or did you talk to Mr. Smith about this porch?

(Testimony of Audrey Henderson Cutting.)

A. Mr. Smith came to me.

Q. Did he at any time say he would include the porch in the original price?

A. He said it would cost such a small amount that it didn't make any difference.

Q. It still remained the \$9800 then?

A. He said it was such a small amount that it wasn't necessary, that it shouldn't exceed \$200.

Q. Did you ever agree to pay anything more?

A. No, I did not.

Q. He went ahead and completed the porch?

A. Yes.

Q. And——

The Court: When was the house first rented?

The Witness: I believe that I actually didn't take possession until about the 15th of July, 1948.

The Court: Has it been rented since that time?

The Witness: Mr. Fox moved recently but Mr. Louis now lives in it.

The Court: Would you mind telling us how much rent you are receiving?

The Witness: I am receiving \$150 a month rent.

The Court: Is this the same amount since first rented in July?

The Witness: Yes.

The Court: What is done with the rent received by you?

The Witness: It is used in support and maintenance and education of my daughter. It is put in her account.

(Testimony of Audrey Henderson Cutting.)

The Court: How do you get money out of her account?

The Witness: By being guardian.

The Court: Do you sign her name and then yours as guardian?

The Witness: We had a partnership account. She can sign checks as well as myself.

The Court: Just the same as you can?

The Witness: Yes.

The Court: What is her age at the present time?

The Witness: She is 17.

The Court: How long has this account been in existence?

The Witness: Since August 1st last year.

The Court: Has she actually drawn any checks on this account and how much has she drawn? [27]

The Witness: About, well, I would say \$100 a month.

Further Redirect Examination

By Mr. Kay:

Q. Where is that account?

A. Seattle First National Bank.

Q. Are rent checks deposited in that account?

A. Yes, because my daughter is outside going to school.

Q. This is really a joint account? A. Yes.

Q. Does this account consist entirely from the rents from the building?

A. No. I deposit other moneys to this account

(Testimony of Audrey Henderson Cutting.)

and this is an educational fund and just in case anything happened to me she would have money for her education and livelihood.

Q. When you receive this rent do you receive it by check? A. Yes.

Q. How do you get this money to the joint account?

A. I deposit it to my account which is a trust account and then forward it to the Seattle Bank. I have a trust account for all moneys which are taken into escrow.

Q. You deposit to that account?

Mr. Butcher: Objection.

The Court: Sustained.

Court will stand in recess.

(Short recess.) [28]

Mr. McCarrey: I should like to call Mr. Harrison to establish one point.

JACK F. HARRISON

called as a witness herein, being first duly sworn, testified as follows:

Direct Examination

By Mr. McCarrey:

Q. State your name?

A. Jack F. Harrison.

Q. Where do you reside?

A. Anchorage, Alaska.

(Testimony of Jack F. Harrison.)

Q. What is your business?

A. Manufacturing concrete products.

Q. And you are familiar with the merchandise and the conditions surrounding same that you delivered to the job known as the Cutting job?

A. Yes, sir.

Q. Do you recall whether any lien was ever filed?

A. Yes, sir.

Q. I hand you Exhibit "B," is that your signature at the bottom? A. Yes, sir.

Q. This lien was filed against lot 2 in block 37-D in the South Addition for merchandise that you delivered to the Audrey Cutting job? [29]

A. That is correct.

Q. I will ask if you recall whom you gave credit to on that particular job?

A. Mr. Smith came to me with the contract and wanted to know if we would supply materials and I said I could and then I called Mrs. Cutting on the 'phone to see what the deal was between she and Mr. Smith. She said Mr. Smith had been authorized to build the house and she said she would guarantee the accounts.

Q. How did the bills read?

A. Russell Smith, the Audrey Cutting Job.

Q. You gave credit to Audrey Cutting?

A. Yes.

Cross-Examination

By Mr. Butcher:

Q. Do you have those bills with you?

A. I think Mr. McCarrey has them.

(Testimony of Jack F. Harrison.)

Mr. McCarrey: If counsel wishes we will be glad to identify them.

Q. (By Mr. Butcher): I will ask you if you know what these items represent?

A. They represent the deliveries on the dates indicated on the bills.

Q. Will you look through those and see if all of those are your slips which you checked out to the Audrey Cutting job? [30]

A. They are.

Q. And they are all for merchandise?

A. That is correct.

Q. Mr. Harrison, the first you knew anything about the Audrey Cutting job was when Mr. Smith came to you? A. Yes.

Q. Did he state how much material he would need and where he wanted it to be delivered?

A. Yes.

Q. Did he tell you he had a contract?

A. Yes.

Q. Did he tell you he was not to be paid until the house was built? A. That is right.

Q. Did he tell you not to expect payment until he got his money? A. Yes.

Q. It was sometime later that you had a doubt whether Mr. Smith's credit was good?

A. That is right.

Q. Before you delivered the blocks?

A. Yes, that is right.

Q. Audrey Cutting told you that there was such a contract? A. That is right.

(Testimony of Jack F. Harrison.)

Q. Did you ask her about the terms and that nothing would [31] be paid until the house was completed?

A. No, I didn't ask about that.

Q. Did you know that \$9500 was the price for the job as set forth in the contract?

A. No, I didn't know the amount that was stipulated by the contract.

Q. Is this your normal method of billing?

A. Yes.

Q. You understood that the job was for Audrey Cutting that Russell Smith was the man with whom you were dealing?

A. That is right.

Q. Now, in your conversation with Mrs. Cutting did she say that she would pay if Smith didn't?

A. That was my understanding.

(Witness excused.)

ARTHUR F. WALDRON

called as a witness herein, being previously duly sworn, resumed the stand, and testified as follows:

Further Redirect Examination

By Mr. McCarrey:

Q. Mr. Waldron, you state that you had delivered merchandise and material to the Audrey Cutting job and that was represented by a lien which was filed in the sum of \$377.61, and I ask if you can identify them?

(Testimony of Arthur F. Waldron.)

A. Yes, those are the liens representing the materials delivered [32] to the Audrey Cutting job at 410 "H" Street.

Q. I ask if she signed for them?

A. No the deliveries were signed for by Russell W. Smith.

Q. Do they represent all merchandise delivered to the Audrey Cutting job? A. They do.

Recross-Examination

By Mr. Butcher:

Q. Mr. Waldron, are these in your handwriting?

A. They are not. They are made out by the man who makes the delivery.

Q. Do you recognize his handwriting—would you examine them and identify them. Do you find them to be correct? A. I did.

Q. Were those slips issued in your regular course of business?

A. That is our regular delivery form, person on the job signs it—signs the original and the other duplicate goes to our office.

Q. They are issued contemporaneously with the delivery of the merchandise?

A. That is right.

Mr. McCarrey: Enter it as Alaska Sand and Gravel Company exhibit "E." [33]

Q. (By Mr. Butcher): Mr. Waldron, did you examine these documents for the signature of the

(Testimony of Arthur F. Waldron.)

person who received the goods and would you recognize Mr. Smith's signature?

A. I can't say I would recognize Mr. Smith's signature. . .

Q. You are not insisting that Audrey Cutting received it?

A. No, that they were delivered on the property designated as her's and Mr. Smith made receipt of the materials.

The Court: That is all, Mr. Waldron.

(Witness excused.)

RUSSELL W. SMITH

called as a witness herein, being first duly sworn, testified as follows:

Direct Examination

By Mr. Grigsby:

Q. State your name, please?

A. Russell W. Smith.

Q. You are one of the defendants in this action, Mr. Smith? A. Yes.

Q. You have been in the court room, haven't you? A. No, this is the first day.

Q. All afternoon? A. Yes.

Q. You are the Russell W. Smith who made a contract with Audrey Cutting on lot 2, block 37-D of the City of Anchorage? A. Yes. [34]

(Testimony of Russell W. Smith.)

Q. Mr. Smith, I will hand you a paper and will you state, if you know, what that is?

A. This is bookkeeper's copy of the bills that were taken on Audrey Cutting Job.

Q. That is the itemized account of the expenses occurred in the construction of that building?

A. That is right.

Q. On the back of that is a list of labor and is that for the same construction?

A. That is right.

Q. Did the materials charged here and the labor charged here on the back of this paper go into the construction of that building?

A. As far as I know that is a correct account of it.

Q. You furnished that to Mr. Kay as being a correct account, did you not?

A. Yes.

Q. Who keeps your books? A. My wife.

Q. Your wife, is that right? A. Yes.

Q. Now, on that account there is an item—Brady's Floor Covering, \$472.20, is that correct?

A. As far as I know. I don't know anything about it except that she took care of the bills. [35]

Q. She did all of the bookkeeping?

A. Yes.

Q. That is the data for the purpose of your bankruptcy proceeding? A. I think so.

Q. You have a list of labor for William Besser, Lee Runkle, Ray Bullerdick—

(Testimony of Russell W. Smith.)

Mr. Butcher: Objection.

The Court: Overruled.

Q. (By Mr. Grigsby): —Floyd Baxley, Edward Charles Rankin and Arden Bell? Did those men work on the construction of that building?

A. They did.

Q. Is this correct?

A. As far as I know.

Q. Is this the total of the hours they worked and the amounts they had coming?

A. As far as I know.

Q. You haven't paid any of these bills, have you?

A. No.

Q. There is a charge here—Floyd Baxley \$220—was that for materials furnished, do you remember? Was that for lumber?

A. I think it was.

Q. You know, don't you? [36]

A. Yes, that was for lumber that went into the building.

Mr. Butcher: If it is a true exhibit, is it about to be introduced in evidence?

Mr. Grigsby: I suppose I have a right to prove my account in my own way—prove by his oral testimony that those particular amounts are true. However, in the interest of harmony I will offer this paper in evidence.

That is all.

Cross-Examination

By Mr. Butcher:

Q. In answer to Mr. Grigsby's question, you stated your wife is a bookkeeper?

A. Yes.

(Testimony of Russell W. Smith.)

Q. State her name?

A. Orilla I. Rowe.

Q. Is this her writing on this record?

A. I think it is.

Q. It is in your wife's writing?

(No response.)

Q. Do you recognize this as a list from your record book? A. I think it is.

Q. Please explain just how you came to get this sheet and who prepared it and what is its purpose?

A. Well, the bookkeeper prepared it—the sheet.

Q. Who prepared it? [37]

A. Orilla I. Rowe.

Q. What did she prepare it from?

A. From the record she had that I had gotten from the various companies that had furnished materials.

Q. From bills? A. Yes.

Q. You accepted those bills as correct?

A. Yes.

Redirect Examination

By Mr. Grigsby:

Q. Now I have here an item, Kennedy Hardware for \$87.34, is that correct?

A. As far as I know that was correct.

Q. You never disputed it? A. No.

Q. City Electric, \$450.28, is that correct?

A. To my knowledge it is.

(Testimony of Russell W. Smith.)

Q. Charles Fritts, paint \$647.80, that was a bill rendered to you by the Alaska Paint and Glass Company? A. As far as I know it is.

Q. Brady's Floor Covering, \$373.20, is that correct. A. As far as I know, yes.

Q. Have you paid any of those bills?

A. No.

Q. I will ask, were you ever paid anything on this contract? [38] A. No.

Q. The different partnerships and persons represented on this sheet and on the back have requested payment from you, have they not?

A. Yes.

Q. You are unable to pay it because you have never been paid? A. Yes.

Q. (By Mr. Kay): Mr. Smith, this is an item here for the Alaska Plumbing and Heating Company in the amount of \$1,788.04, does that represent material that went into the construction of this house? A. It does.

Q. Is this a true and correct statement on that account? A. Yes.

Q. You have never questioned it, have you?

A. No.

Q. And the bill for the Ketchikan Spruce Mills in the amount of \$2,717.86, is this correct?

A. So far as I know it is true.

Q. Is that a true and correct statement of the value of the materials?

A. Yes, as far as I know.

(Testimony of Russell W. Smith.)

Q. Mr. Smith, have you ever questioned the Ketchikan Spruce [39] Mills' account?

A. No, I haven't.

Q. (By Mr. Grigsby): I meant to ask you, on this labor account whether or not you have designated the number of hours each man worked?

A. Yes.

Q. Now, did you furnish your bookkeeper with their time from which she made up this account?

A. Yes.

Q. When? A. Every night.

Q. And you kept a time book?

A. No, just working hours from a sheet of paper. Every night she entered into a book from this sheet of paper the number of hours each laborer had worked.

Q. Is this the correct number of hours for each laborer? A. Yes, so far as I know.

Recross-Examination

By Mr. Butcher:

Q. How much an hour were you paying these men, Mr. Smith?

A. The scale set at that time was \$2.56 per hour.

Q. What did you agree to pay them?

A. I agreed that they would receive a bonus if they completed the job and waited until they got their pay and I could collect my money from Audrey Cutting. [40]

But they got \$2.56 if they wanted cash but if they

(Testimony of Russell W. Smith.)

waited until I collected from Audrey Cutting they would get another dime.

Q. Did you ever have any definite arrangements with Arden Bell?

A. He was my layout man and I was going to pay him a little more.

Q. What was your agreement with Arden Bell?

A. I am not sure.

Q. Was it that you agreed to pay him \$2.76 an hour? A. I am not sure.

Q. You don't remember whether you agreed to pay him ten cents? A. No.

Q. What was the going carpenter's wage at that time? A. \$2.56.

Q. Was it discussed between you and these men when they went to work for you what the scale of wages was? A. Not to my knowledge.

Q. Mr. Smith, when did you commence the construction of that house?

A. I am not sure of the time.

Q. Was it in April or May?

A. I am not sure.

Q. Was it during the months of April, May and June, 1948? A. I am not positive. [41]

Q. Was it in 1948? A. Yes.

Q. You entered into the contract for the construction on April 30th, isn't that right?

A. Yes.

Q. Did you commence construction within a few days afterwards? A. I am not sure.

(Testimony of Russell W. Smith.)

Q. Within a week? A. I think so.

Q. Do you know when you did the last work on the place? A. I am not positive.

Q. Was it in June? A. I think so.

Q. What was the last work done there?

A. Painting.

Q. Was it the painting of the exterior?

A. I am not certain.

Q. You couldn't say? A. No.

Q. Have you any records showing when you completed construction on the work and, if so, where are they?

A. Mr. Kay has all my records as far as I know.

Q. Has he the sheets for every day's work?

A. I think that he has all my wife had to go on.

Q. Where is she? A. In Seattle.

Q. Has she any of the papers with her?

A. I couldn't say.

The Court: How much experience have you had in building houses, Mr. Smith?

A. I have had about twenty years.

Q. (By Mr. Butcher): Mr. Smith, I believe you testified that you wrote the number of hours of work down on a slip of paper and that you gave this to your bookkeeper? A. Yes.

Q. You did that for each man who worked for you? A. Yes.

Q. Was that a separate piece of paper that was kept in each case? A. No, all on one sheet.

Q. Did you indicate opposite the figure the man's name? A. Yes.

(Testimony of Russell W. Smith.)

Q. Were you present each morning when the men went to work? A. Yes.

Q. Is it a fact, Mr. Smith, that you were out around town getting materials together?

A. Yes.

Q. Is it a fact that you were around town during lunch hour [43] and you wouldn't know whether they started or quit on time or not?

A. No.

Q. Did you take the men's own word for the hours worked?

A. I was there each morning and noon at the start of work.

Q. In the case of Besser was he working at all hours and at any time you were around there?

A. He was there at the time I was there.

Q. Did you have any method of checking on the men other than his own statement?

A. I was there. But off and on I would be out looking for materials.

Q. You stated you would be gone several hours?

A. I don't believe I said several hours—part of the time, yes, to keep materials on the job.

Q. Did you do more hunting than you did working? A. No, I wouldn't say that I did.

Q. You believe that each man reported a true picture of the number of hours worked and you were satisfied with it, isn't that correct?

A. The men who worked would hand me the slips and I made them out myself. They quit at twelve and were there until they left at night.

(Testimony of Russell W. Smith.)

Q. You were not there between some of these hours but you were satisfied that they had been working the number of hours [44] stated and that they were not working on the job next door at the same time they were working on this job?

A. Yes.

Q. You are certain Mr. Besser didn't work on the job next door at the same time he was working for you?

A. Couldn't know about that.

Q. Couldn't know about Mr. Bullerdick without looking at your records, is that correct?

A. No. I just about completed with the Audrey Cutting job when I started on the Seifert job.

Q. Isn't it a fact you pulled men off the Cutting job and took them over and finished the Seifert job?

A. No, that isn't true.

Q. You never pulled Bullerdick for an hour to——

A. No.

Q. Did you add up the total number of hours each day and did you compute them before you gave them to the bookkeeper?

A. No.

Q. Did you check the bookkeeper in order to see if she was getting an accurate work date of the slips you gave her?

A. I checked them.

Q. When did you check them?

A. At the completion of the job.

Q. Did you check them against the figures on this page?

A. No, I didn't. I didn't have the slips; I destroyed the [45] slips.

(Testimony of Russell W. Smith.)

Q. What did you check them against?

A. I could remember in my mind when the work was done and how many of them were working.

Q. As a matter of fact, Mr. Smith, you wouldn't know whether these figures were accurate because you took your bookkeeper's word for it?

A. Yes.

Q. Your bookkeeper isn't here now? Do you remember the dates you started the Seifert construction? A. I am not certain.

Q. Do you remember the dates you finished with Audrey's house? A. I am not certain.

Q. How do you know it was a week; it is just a case of guessing, isn't it, Mr. Smith?

A. Well, the record shows the difference between the time.

Q. I would like to have you examine those names as they appear on this sheet and tell me if any of those worked on the Seifert construction?

A. Yes.

Q. Which men worked on the Seifert construction?

A. Arden Bell, Eddie Rankin, Lloyd Baxley, Lee Runkle.

Q. Four of them worked on the Seifert construction? A. Yes.

Q. The only two men who didn't were Buller-dick and Besser? [46] A. As far as I know.

Q. Do you know of a certainty that they did not go back and work on the Cutting property?

(Testimony of Russell W. Smith.)

A. As far as I know they didn't.

Q. Do you have any record which will show when the last day of construction occurred on the Cutting property?

A. The bookkeeper has them and she turned the books over to Mr. Kay.

Q. And did those books show the exact date of the last day of construction?

The Court: The date you actually finished the Cutting house?

The Witness: Yes.

Q. (By Mr. Butcher): Did Audrey ever tell you that certain defects occurred that she expected you to fix and expected you to take care of?

A. I am not certain.

Mr. Butcher: I submit that this witness be called to produce evidence as to the authenticity and accuracy of his records and that he has only relied on a sheet from an account book written by some other party and the figures he has not checked in any adequate way and therefore the exhibit as previously received by the Court is not sufficient to be admitted as an exhibit.

Q. Mr. Smith, isn't there some method by which you can determine [47] when you finished the construction? A. Not except by the books.

Q. You can't accurately find out—haven't you any idea when you finished the house, whether it was in the month of September? A. No.

Q. Do you have any idea whether it was in the summer or the winter?

(Testimony of Russell W. Smith.)

A. It was in the summer.

Q. That would be the summer of 1948?

A. Yes.

Q. Would it have been June, July or August?

A. I don't exactly recall but don't believe it was in June.

Q. Did you apply for a building permit in connection with the Seifert property? A. Yes.

Q. And you did also with the Cutting property?

A. Yes.

Q. Is it not a fact that you had an open account with various merchandisers?

A. The only account I had with them, I showed them the contract which showed that I would get my pay after completion of the house.

Q. How did you separate the materials from the Cutting property, there was no fence between them?

A. There was a fence and each material was put in its proper place.

Q. Didn't you transport various property from lot to lot when you needed a hammer or tool?

A. They didn't all the time I was there.

Q. Did you ever check the material on the list and check it against the material actually received?

A. Yes, and when it came it was all there.

Q. You say that you got every item for which you were billed? A. Yes.

Q. You are satisfied that you got every item for which you were billed? A. Yes.

Q. You never found any inaccuracies?

(Testimony of Russell W. Smith.)

A. Never found any shortage.

(Short recess.)

The Court: Court will stand adjourned until 10 o'clock tomorrow morning.

(Whereupon, at five o'clock, p.m., Tuesday, February 8, 1949, the trial was continued until 10 o'clock, a.m. the following day.) [49]

Wednesday February 9, 1949

Mr. Butcher: Your Honor, yesterday I asked that any counsel who had papers pertaining—that these papers be produced up to date. No papers have been furnished me by Mr. Stringer. I ask that he produce them at this time.

Mr. Stringer: Your Honor, I don't recall having any such papers.

Mr. Grigsby: Your Honor, I have a sheet from the Seifert place, if you want it, same form as the one on the Cutting place.

Mr. McCarrey: Your Honor, I would like to inquire as to the relevancy of the matters pertaining to the Seifert property.

The Court: Nothing directly to the Cutting construction but it may have relevancy to what counsel is driving at.

Mr. Butcher: For the Court's information I wish to justify certain bills, including bills for materials and work furnished to the independent contractor to show that such charges to this property

(Testimony of Russell W. Smith.)

were actually for work performed on the Seifert property.

Your Honor, may I have permission to go into the library for a few minutes?

The Court: Permission is granted.

(Short recess.)

Mr. Butcher: Your Honor, we have found the file in the library which contains certain documents which, I believe, we [54] may be able to use at this time.

Recross-Examination

(Continued)

By Mr. Butcher:

Q. Mr. Smith, you had an opportunity overnight to recall papers which may help your recollection as to when you finished the Cutting job.

A. No.

Q. You have no information as to when you commenced the Seifert job? A. No.

Q. If Mrs. Cutting were to testify that you finished her job the first 10 days in July, would that help you to recall? A. I am not sure.

Q. I hand you a copy of a letter addressed to you and ask you to tell the Court what this letter is?

A. It is a letter written to Mr. Seifert.

Q. Written to Mr. Seifert?

A. Yes. It is a letter, a written agreement, stating that at the completion of the work I would pay all the bills. His name is signed to it.

(Testimony of Russell W. Smith.)

Q. What is the date of the letter?

A. The date is June 10, 1948.

Mr. Butcher: I am going to ask that it be marked for identification to establish the time the work was being performed on the Seifert property and we will later offer it in evidence as to when work was completed on the Cutting property.

The Court: Is there no one representing the defendant, [55] Thomas?

Mr. Butcher: Not that I know of.

The Court: It may be marked as Plaintiff's 100 for identification. It is understood that when we refer to the defendant's exhibits we refer to the defendants Henderson and Cutting.

Q. (By Mr. Butcher): Mr. Smith, in examining this picture, did you note the date thereon?

A. June 10th.

Q. June 10th. And if you were working on the Seifert premises on June 10th and were working on the Cutting premises as late as the 10th day of July, one month would elapse between the commencement of the Seifert job and the completion of the Cutting, is that correct? A. I don't understand.

Q. If you were working on the Seifert job on June 10th and didn't finish the Cutting job until July 10th, you were working on both at the same time?

Mr. Grigsby: I object to that as being argumentative.

The Court: Objection sustained.

(Testimony of Russell W. Smith.)

Mr. Butcher: Your Honor, I will offer it at another time.

Mr. Grigsby: I object to its being offered as not being relative to the case. [56]

The Court: Objection is sustained.

Mr. Butcher: I will withdraw the offer at this time, Your Honor, and exhibit it at a later time. I would like to inquire of this witness as to the construction of the porch and any agreement he might have had with Mrs. Cutting over and above the contract?

The Court: You may proceed.

Q. (By Mr. Butcher): You were present in Court and heard about the construction of the porch? A. Yes.

Q. You had previously entered into this contract for \$9800 which you had both signed?

A. Yes.

Q. Regarding construction of the porch, had you asked her if she would consent to the construction of the porch? A. Yes.

Q. Did you set any price on that construction?

A. I said approximately \$400 or more. I wouldn't set any price for it but stated it would be \$400 or more.

Q. Did you make any notations at that time?

A. No.

Q. Were there any other persons present at the time you talked to her about that?

A. Baxley and Lee Runkle. [57]

(Testimony of Russell W. Smith.)

Q. Did you talk it over with Baxley?

A. Yes. Mr. Lee Runkle is outside, but he recalls the conversation.

Q. Did Cutting agree to the verbal contract?

A. Yes.

Q. Did you then proceed to construct that porch? A. Yes.

Q. Did you complete it? A. Yes.

Q. Do you have any figures available which would indicate the cost?

A. No, they are in the records.

Q. Would your record be sufficiently broken down to show you the time and material on that porch? A. I am not certain.

Q. You don't have any other breakdown?

A. No.

Q. You couldn't show the additional cost of that porch, could you? A. No.

Further Redirect Examination

By Mr. Grigsby:

Q. I want to go back to Plaintiff's Exhibit "A," the item for labor on the Cutting residence—Lee Runkle. Did Lee Runkle start work on that construction when the construction [58] commenced?

A. Yes.

Q. Did he work until the construction was finished?

A. Yes, until I drewed him off and put him on the Seifert job.

(Testimony of Russell W. Smith.)

Q. Did you keep a separate work sheet on these men who worked on the Cutting job and on the Seifert job? A. Yes.

Q. The labor on the Seifert job is computed at \$2.56 a hour, isn't it? A. Yes.

Q. There was no agreement about waiting for their money as there was on the Cutting job?

A. No.

Q. Did you go back and forth to work with Runkle during that construction?

A. Yes, he came to the house and picked me up every morning.

Q. Did he work on that construction longer than any other?

A. No, he was one of the first men I pulled off. He went to supervise.

Q. Did you notice his time book?

A. No, he never showed it to me.

Q. You state the contract was dated April 30th, isn't that correct? A. Yes. [59]

Q. Did you go to work on that construction within a few days after that? A. Yes.

Q. Could you say, Mr. Smith, from having come back and forth with Mr. Runkle nearly everyday during that construction that Runkle's time sheet to which he has been credited with 228 hours of labor is correct?

A. Yes, I think that is correct.

Q. Now, in consulting that time on this sheet, is that figured at \$2.66 or \$2.56, or do you recall?

(Testimony of Russell W. Smith.)

A. This has been figured out at \$2.56.

Q. And the agreement was that if he were to wait until the job was completed that he got an additional ten-cents an hour? A. Yes, sir.

Q. Did Baxley go to work when work was commenced? A. Yes.

Q. About the same time as Runkle?

A. Approximately the same time.

Q. You have filed a lien claim for the amount of your contract against this property, didn't you?

A. Yes.

Q. Is this your signature?

A. Yes, it is.

Q. And in this statement you state that the last day on which you claim to have worked and furnished supplies under [60] this contract as afore-said was June 19, 1948, would that refresh your memory as to when that job was completed?

A. Yes.

Q. Did you furnish Mr. Stringer with that job sheet at that time?

A. It came from Kay's office, I am not sure.

Q. Can you state when was the last day you worked on the construction of the Cutting residence? A. No, I couldn't, off-hand.

Q. Is this correct in your statement, the 19th?

A. As far as I know.

Q. Did you work on it any in July? A. No.

Mr. Grigsby: We offer this in evidence in order

(Testimony of Russell W. Smith.)

to clarify the matter, showing the work and material charged to the Seifert residence.

Mr. Butcher: No objection.

The Court: How soon after you received the letter from Mr. Seifert did you start work on the Seifert property?

The Witness: Right immediately.

Mr. Stringer: If the Court please, this claim of lien has been identified. I would like to enter it as Trustee in Intervention Exhibit 2, I believe. The contract was Exhibit 1 of Mr. Smith's.

Q. Mr. Smith, yesterday afternoon you heard Mrs. Cutting [61] testifying?

Mr. Butcher: Under what status is he examining?

Mr. Stringer: Trustee in bankruptcy.

Q. You heard Mrs. Cutting testify yesterday afternoon as to the building of the porch. She testified that the porch would be built for the sum of \$200, do you recall any such conversation as that?

A. No.

Mr. Butcher: Object to as being repetitious.

The Court: Objection overruled.

Q. (By Mr. Stringer): Do you recall what figure was being agreed upon?

A. Approximately four or more.

Q. Did she tell you to go ahead with that construction? A. Yes.

Q. And you did go ahead with that construction?

A. I did.

(Testimony of Russell W. Smith.)

Q. Mr. Smith, this verbal agreement on the building of a porch was entered into sometime subsequent to the written contract? A. Yes.

Q. Now in this claim of lien you state that the work was completed and the materials all furnished sometime before June 19, 1948. That would be the date of the completion of the house. Was that house completed on that date or was there [62] anything left to be done?

A. When the keys were turned over to her there was nothing left to be done.

Q. You turned the keys over to her?

A. Yes, I turned over one key.

Q. Did she promise to pay you any money?

A. She paid me \$150. She said as soon as her FHA loan came through she would pay.

Q. How was that amount paid—in cash?

A. That was paid by check.

Q. She accepted the key from you sometime after June 19, 1948? A. Yes.

Q. After the house was finished? A. Yes.

Q. Mr. Smith, in building this house did you comply with the terms of the contract in every respect? A. Yes, sir.

Q. Was the wiring done in accordance with the electrical code? A. It was.

Q. Was it approved by the Building Inspector for the City of Anchorage?

A. The Building Inspector okehed it.

Q. It is in your claim of lien that your addi-

(Testimony of Russell W. Smith.)

tional bill for [63] this porch cost \$700, is that correct? A. Yes, as far as I know.

Q. You don't know what the scale for the area of that porch would be, do you?

A. Not off-hand.

Mr. Stringer: That is all.

Q. (By Mr. Grigsby): Mr. Smith, Mr. Butcher asked you about Mr. William Besser working on the Seifert house. I believe you stated that he did not work on the Seifert job at all. What is that paper?

A. That is Mr. Besser's withholding tax statement.

Q. That shows a total of \$64 before payroll deductions? A. Yes.

Q. And that was work done on the Cutting residence? A. Yes.

Q. Dates May 18th to May 21st? A. Yes.

Mr. Grigsby: We offer that in evidence.

The Court: It will be marked plaintiff's exhibit 3.

Q. (By Mr. Davis): Mr. Smith, in connection with building that house, we have called it here the Cutting house, did you purchase certain materials from the Wolfe Hardware? A. I did.

Q. In the course of constructing that house did you have [64] certain work and materials from Ken Hinchey?

A. He did the excavating for us. This consisted of a full basement and the work for the water and the fuel lines in the area.

(Testimony of Russell W. Smith.)

Q. Do you know whether or not the excavating might have been done prior to the time that the written contract was signed with Mrs. Cutting?

A. I am not certain.

Q. Do you know whether or not the excavating done by Mr. Hinchey was done approximately at the same time the contract was signed? Was your answer that you don't know or you do know?

A. I don't know.

Q. In dealing with the Wolfe Hardware, Mr. Smith, were your dealings the same as with the Anchorage Sand and Gravel as you have previously testified, that you were the contractor and that you had a contract with Mrs. Cutting?

A. That is correct.

Q. Now, on getting purchases from Wolfe Hardware did you personally pick up those purchases and take them out to the house? A. I did.

Q. At the time you made a purchase at the Wolfe Hardware were you given a slip showing what you purchased? A. Yes. [65]

Q. Were those slips marked "The Cutting Job"? A. Yes.

Q. Did you sign the various purchase order slips as you made each purchase? A. I did.

Q. I hand you a sheaf of papers and ask you if your name appears on these sheets?

A. It does.

Q. Does your signature appear on each of these sheets? A. Yes.

(Testimony of Russell W. Smith.)

Q. Are those duplicates of the bills purchased by you at the Wolfe Hardware? A. Yes.

Q. Are those the materials purchased for the Cutting job at the Wolfe Hardware? A. Yes.

Q. Did all of the materials go into the house called the Cutting house? A. Yes.

Q. Have you been paid anything on account?

A. No, I haven't.

Q. Do these slips represent what you did purchase for the Cutting job? A. Yes.

Mr. Davis: I would like to have this marked for identification. [66]

The Court: It will be marked Wolfe Hardware Exhibit 200.

Q. (By Mr. Davis): Mr. Smith, I call your attention to that particular slip, is that your signature on that particular slip? A. It is.

Q. (By Mr. Kay): Mr. Smith, you seem to feel that there might be some confusion about your testimony yesterday concerning your wife and your bookkeeper referred to as Miss Rowe, is this your wife? A. At the present time.

Q. Those entries are in her handwriting?

A. Yes.

Q. They were made from records supplied by you? A. Yes.

Q. (By Mr. McCarrey): Mr. Smith, were you in Court yesterday when Mr. Waldron and Mr. Harrison testified as to the materials supplied by them? A. Yes.

(Testimony of Russell W. Smith.)

Q. I believe you have listed here on Plaintiff's Exhibit AA an account for Anchorage Sand and Gravel, \$77.15, is that correct?

A. As far as I know it is.

Q. I hand you Exhibits D and E respectively of the intervenors, [67] will you check to see if your name appears on most of those exhibits?

A. My name appears on all except one—on the Cinder Blocks which Lee Runkle authorized for me.

The Court: In every instance was that merchandise received and put into the Cutting House?

The Witness: Yes, Your Honor.

Q. (By Mr. McCarrey): I hand you here a slip from the Anchorage Sand and Gravel and does your name appear on that? A. Yes.

Q. Did all of the merchandise for which you signed here go into the construction of the Cutting house? A. Yes.

Q. (By Mr. Stringer): Mr. Smith, there was some testimony yesterday about the doors not fitting in the Cutting house. At the time you finished the house and turned the key over to her were those doors and windows tight and did they fit properly?

A. As far as I know they seemed perfect and worked with ease.

Q. Did the cupboards and cabinet work? And were they installed properly?

A. In accordance with the contract they were.

Q. Do you recall whether there was any leak in the basement or in the building at the time you finished the house?

(Testimony of Russell W. Smith.)

A. No, I don't. At the time there was one small leak which [68] the plumbing company came back and fixed at their own expense. It was a paint leak in one of the elbows.

Q. How much time elapsed from the completion and the time Mrs. Cutting moved in?

A. I am not certain.

Q. Mr. Smith, do you recall the time you turned the key over to Mrs. Cutting?

A. I can't recall.

Q. Sometime subsequent to June 19, 1948?

A. Yes.

Q. Mr. Smith, the contract provides that the contractor shall be present in person or a duly authorized representative at all times the work is in progress. How much time did you spend searching for materials, were you off and on the job continuously during the course of the work?

A. Some days I was; some days I was there all day and other days I would be gone two or three hours but no longer than two hours at a time.

Q. You also agreed to keep the property free and clear of all liens and pay them promptly. Was your failure to do this because of the fact that Mrs. Cutting failed to pay you?

A. That is correct.

(Short recess.)

(Testimony of Russell W. Smith.)

Further Recross-Examination

By Mr. Butcher: [69]

Q. I believe you testified earlier what the time scale was for carpenters' wages?

A. The going scale at that time was \$2.56.

Q. Who sets this scale? A. The union.

Q. That was \$2.56, did you say?

A. Yes, per hour.

Q. Per hour? A. That is correct.

Q. You agreed to pay more than that, how much more? A. 10 cents per hour.

Q. Did you intend to absolve that yourself or did you intend to charge that against the contract?

A. That was supposed to come out of the building.

Q. In your lien claim is that claim computed on 266 per hour? A. I am not certain.

Q. Is your lien claim an accurate claim? I believe you testified that it was? A. Yes.

Q. Do you know whether the figures on your work sheet secured from your bookkeeper records include the \$2.66 per hour?

A. I am not certain.

Q. Did you have any approval from the union to pay that extra scale?

A. They have no complaint as to how much more I paid above [70] the scale.

Q. That is your own business? A. Yes.

(Testimony of Russell W. Smith.)

Q. Did you have any architectural plans drawn for this building? A. Yes, I did.

Q. Do you have them? A. Yes.

Q. Do they include the porch? A. Yes.

Q. Does it show a list of materials which were required in addition to the regular value for the porch? A. No.

Q. Who drew the drawings?

A. They were drawn by an architect.

Q. Don't they furnish a list of materials?

A. Not unless they are asked for.

Q. It doesn't show the material that went into it? A. No.

The Court: Would you get the plans and give them to counsel?

The Witness: I haven't them here but have them in my house.

The Court: Bring them for the noon recess. [71]

Further Redirect Examination

By Mr. Stringer:

Q. The porch wasn't included in your original contract agreement with Mrs. Cutting?

A. No.

Q. Even though it was included in the plans?

A. No.

The Court: When did you have the plans made, Mr. Smith?

The Witness: I had to get an architect to draw them for me. They were a little late getting on the job so I didn't use them at first.

EUGENE BRADY

called as witness herein, being first duly sworn, testified as follows:

Direct Examination

By Mr. Grigsby:

Q. State your name?

A. Eugene Brady.

Q. You are known as Gene Brady also?

A. That is right.

Q. Are you one of the persons of the partnership known as Brady's Floor Covering?

A. Yes.

Q. Kennedy Hardware Company is the other partnership? [72]

A. That is right.

Q. Did your firm, Brady's Floor Covering, furnish any material for the construction of the residence built by Russell Smith?

A. Yes, we did.

Q. Have you an account of the material furnished Mr. Smith in connection with that construction?

A. Yes, we have.

Q. Have you it with you? A. No.

Q. Is this the itemized list of the material furnished?

A. No, this is the Kennedy Hardware.

Q. Is this the correct list of the material furnished on that building?

A. Yes, it is.

Q. What is the total of same? A. \$474.41.

Q. Do you know that those items on that list was furnished to Mr. Smith on that building?

(Testimony of Eugene Brady.)

A. Yes, I do.

Q. Did you install the goods?

A. No, our men installed them.

Q. Were you out there and can state that it was done?
A. Yes.

Q. Did you see all of it go into the building?

A. Yes.

Q. Has anything been paid on it?

A. Nothing.

Q. Was it charged to Russell Smith and Mrs. Cutting?

A. Mrs. Cutting picked out the colors but it was charged to Russell Smith.

Q. It was charged to Russell Smith and not Mrs. Cutting, is that right?
A. Yes.

Cross-Examination

By Mr. Butcher:

Q. Is the labor included in the total bill?

A. Yes, it is.

The Court: It will be admitted as Plaintiff's Exhibit DD.

Mr. Grigsby: That is all.

Mr. Butcher: No questions.

TED VAN THIEL

called as a witness herein, being first duly sworn, testified as follows:

Direct Examination

By Mr. Grigsby:

Q. State your name?

A. Ted Van Thiel.

Q. Are you one of the firm known as the Kennedy Hardware Company? A. Yes, I am.

Q. Who are the other members of the firm? [74]

A. Bob Reeve, Janice Reeve, Pat Cartee, Jean Cartee, and Patsy Van Thiel.

Q. You have been a partner with Gene Brady and Kennedy's Hardware known as Brady's Floor Covering? A. That is right.

Q. Is the Kennedy Hardware—did you have any transaction with Russell W. Smith to furnish him material for the house of Audrey Cutting?

A. Yes.

Q. Did you furnish material for that construction? A. Yes, we did.

Q. Who ordered it? A. Russell Smith.

Q. Have you an itemized account of it? I will ask you what that is?

A. This is an itemized account covering the transaction with Russell Smith on the Cutting job in the amount of \$112.95.

Q. Between Smith and Kennedy Hardware for the Cutting job? A. Yes.

(Testimony of Ted Van Thiel.)

Q. Do you know of your own knowledge that those materials were furnished?

A. Yes, and that was the only arrangement we had with Smith to furnish materials for that job.

Q. It was charged to Mr. Smith and not Mrs. Cutting? A. Yes. [75]

Q. Where was it delivered?

A. Most of it was picked up?

Q. By whom? A. Mr. Smith.

Q. Did he represent to you that it was for the Cutting job?

A. Yes, we had no other arrangement for any other job.

Q. Has anything been paid on that account?

A. Nothing at all.

Cross-Examination

By Mr. Butcher:

Q. The items were for merchandise only and no labor furnished? A. That is right.

Mr. Grigsby: Like to have this admitted as Exhibit EE.

The Court: There being no objection it will be admitted.

Mr. Butcher: No questions.

RAY BULLERDICK

called as a witness herein, being first duly sworn,
testified as follows:

Direct Examination

By Mr. Grigsby:

Q. Say your full name?

A. Ray Bullerdick.

Q. What is your position or occupation?

A. Carpenter.

Q. For how long have you been a carpenter?

A. I would say intermittently for 40 years.

Q. Do you know Russell Smith?

A. I do.

Q. Did you have any business relations with him
last summer?

A. Employed by him as a carpenter.

Q. On what job?

A. On the job known as the Audrey Cutting job
and then a few days on the Seifert job.

Q. With reference to the Audrey Cutting job
on lot 2, block 37-D of the South Addition of the
City of Anchorage, when did you go to work on
that job?

A. On the morning of May 15, 1948.

Q. And when was the last day you worked on
that job? A. 16th of June, same year.

Q. Have you got a record of the number of hours
you worked? A. I have, sir.

Q. Did you keep that yourself?

A. I did.

(Testimony of Ray Bullerdick.)

Q. How many hours did you work on that job?

A. A total of 236 hours.

Q. Was there a price agreed upon per hour?

A. There was.

Q. What was it?

A. \$2.66 per eight-hour shift. [77]

Q. Was that conditioned on waiting for your money? A. It was, sir.

Q. That was ten cents an hour in excess of the going rate, was that?

A. That is right, sir.

Q. That was a special agreement between you and Mr. Smith, was it? A. Yes, sir.

Q. Have you got the total in dollars in value of your services?

A. Multiplying 236 by \$2.66 it comes to \$623.16.

Q. Is that any overtime computed there?

A. That is computing the time one-time and one-half over forty hours as required by law of union regulations.

Q. That is figured in that way?

A. It is.

Q. I will ask you if you filed a lien securing your claim? A. I did.

Q. Is that your signature?

A. That is my signature.

Mr. Grigsby: We offer it in evidence.

The Court: It may be admitted and marked Exhibit W.

Q. (By Mr. Grigsby): Do you know Mr. Lee Runkle? A. I do. [78]

(Testimony of Ray Bullerdick.)

Q. Was he working there as a carpenter during the time you were working? A. Yes.

Q. Was he on the job when you went there?

A. He was.

Q. Did he continue to work for as long as you did or close to it? A. He did.

Q. Now I will ask you here, what was the condition, do you know, when that building was finished?

A. I couldn't state positively but I believe I did the last carpentry work on the Cutting job.

Q. There was some painting done after that?

A. Yes, painting in the process of finishing—painters were there in process of finishing their work.

Cross-Examination

By Mr. Butcher:

Q. I think you stated that you did the last carpenter's work on the Cutting job?

A. I believe I did. I couldn't swear to it. Maybe one of the other carpenters went over to do some smoothing up.

Q. Do your records show the last day your work was done? A. It does.

Q. Would you look that date up and give it to us?

A. My time book shows the last work done by myself was June [79] 16, 1948.

Q. June 16, 1948, and at that time the painting had not been done?

A. As I recall, painters were finished up. They were in each other's way for several days.

(Testimony of Ray Bullerdick.)

Q. Do you have any recollection of work being performed on the Seifert house on the adjoining lot? A. I do.

Q. At that time you were working on the Cutting job and then worked on the Seifert job, you never returned to the Cutting property?

A. No, sir.

Q. Did you ever go for any purpose such as to unload lumber? A. Not as I recall.

Q. Did you go over to get materials?

A. I did not.

Q. Did you have anything to do with the construction of the fence? A. I did.

Q. In relation to the 16th day of June, when you did your last work, when would you say that this fence was completed?

A. One of the carpenters had been working a few shifts. I couldn't say how many but a few shifts prior to my leaving the Cutting job and my work was helping to complete the picket fence. That is the only work I did on the Seifert property. [80]

Q. You did no work on the house?

A. No.

Q. How far was the house along when you went over there? A. I couldn't say, sir.

Q. Would you know if the basement was in?

A. No basement—I couldn't be sure.

Q. Would you know whether the studding was up and whether the roof was up at that time that you went over to work on the Seifert property?

A. I don't recall.

(Testimony of Ray Bullerdick.)

Q. Does your record show the first day you worked on the Seifert property?

A. June 17, 1948.

Q. The day following your last work on the Cutting property? A. That is right.

Q. You have no recollection of the degree of construction on the Seifert house itself?

A. No, only that it was pretty well along.

Q. How many men were working with you on the Cutting property?

A. Runkle and Besser and Baxley—four besides myself.

Q. You heard Mr. Smith that he used the same *ground* of carpenters on the other house, did he do any overcharging?

A. Not to my knowledge, sir.

Redirect Examination

By Mr. Stringer: [81]

Q. There has been testimony here that on the Cutting house the doors and windows didn't fit properly and that the house leaked and so on, do you know whether that condition existed when you left the job?

A. The doors, I would say, worked as good as they could be made to considering the fact that it was a new house.

Q. You would say that that was characteristic of a new structure?

A. Yes, I know no way of avoiding that at the

(Testimony of Ray Bullerdick.)

present time. At the time we left everything was working okeh.

Q. The house was complete when you left?

A. Yes, sir.

Q. There has also been testimony that Mr. Smith was away from the job a considerable amount of time while the house was being constructed, do you know how much time he spent away from the job?

A. I wouldn't know the exact amount of time spent on account of rustling materials or going with a truck or car to purchase the materials, but he was there, I would say at least six and one-half hours, possibly seven each working day.

Q. Did he do any of the work himself?

A. He worked as a regular foreman carpenter.

Q. Would you say he spent as much time on the job as other foremen would and did he do as much work as other foremen do? [82]

A. I would state he did a great deal more than the average foreman, in my experience. He was on the job at least as long as the average or longer than average, in my experience.

Mr. Butcher: I ask that that testimony be stricken. There is no denial of the fact that Mr. Smith, the foreman, didn't need to spend any time on the house and this testimony to prove that he was there on the job is immaterial.

The Court: Objection overruled.

Q. (By Mr. Kay): Mr. Bullerdick, during the time that Mr. Smith should be absent from the

(Testimony of Ray Bullerdick.)

job, would you say that you continued to work or did you lay down on the job?

A. We hit the ball.

Q. (By Mr. Grigsby): Have you been paid any money for your work? A. No.

Q. Did you demand your pay from Mr. Smith?

A. Yes.

Recross-Examination

By Mr. Butcher:

Q. You stated in your answer to Mr. Stringer's question that you were—or, rather, Mr. Smith was present on the job and you felt that he was there six and one-half to seven hours a day every day, isn't it a fact that you had certain work laid out in advance? [83] A. That is correct.

Q. Could you tell when he was going and when he was returning? A. Hardly possible.

Q. You are certain that you would know when Mr. Smith was absent and do your work at the same time?

(No response.)

EDWARD C. RANKIN

called as a witness herein, having been duly sworn, testified as follows:

Direct Examination

By Mr. Grigsby:

Q. State your name?

A. Edward C. Rankin.

(Testimony of Edward C. Rankin.)

Q. Were you one of the carpenters employed on the construction of the building on lot 2 of block 37-D of the South Addition to the original town-site of Anchorage known as the Cutting residence?

A. Yes.

Q. Who employed you?

A. Russell Smith.

Q. As a carpenter?

A. Yes as a carpenter.

Q. How long did you work there for him?

A. I started the morning of May 17th and the last day I worked was June 12th. [84]

Q. What is that paper there?

A. This is a paper I copied from Russell Smith's time book.

Q. For what purpose?

A. I wanted to check up on my time so I could file my lien.

Q. What is the total hours? A. 186 hours.

Q. Didn't you have an arrangement as to the pay per hour?

A. Yes, he agreed to pay a bonus over the union scale if we would wait for our money until the job was done.

Q. The union scale is how much?

A. \$2.56 per hour.

Q. You filed a line to secure your claim?

A. Yes.

Q. Is this your signature?

A. That is right.

Q. You haven't been paid anything?

(Testimony of Edward C. Rankin.)

A. No.

Mr. Grigsby: We offer this in evidence.

Mr. Butcher: No objection to this, Your Honor, but I do object to the copy secured from Mr. Smith's timebook and I object to the questions asked on it and ask that that be stricken.

The Court: Motion denied. The lien will be admitted as Plaintiff's Exhibit GG.

Q. (By Mr. Grigsby): One other question, Mr. Rankin, did you know Lee Runkle? [85]

A. Yes.

Q. Was he on the job as a carpenter for the time that you worked? A. Yes.

Mr. Grigsby: That is all.

Mr. Butcher: No questions at this time.

ARDEN BELL

called as a witness, having first been duly sworn, testified as follows:

Direct Examination

By Mr. Grigsby:

Q. State your name? A. Arden Bell.

Q. Mr. Bell, what is your business?

A. Carpenter.

Q. Did you work on the property that has been testified to known as the Cutting residence on lot 2 of block 37-D of the South Addition of the original townsite of Anchorage? A. I did.

Q. When did you start work? A. May 3.

Q. Who hired you?

(Testimony of Arden Bell.)

A. Russell Smith.

Q. When did you quit?

A. I left the job at June 11th at noon. [86]

Q. Was that the last day you worked on the Cutting job? A. Yes.

Q. Did you keep your time? A. I did.

Q. During that period how many hours did you put in? A. 268.

Q. You have on your lien statement 286?

A. That is figuring the overtime as hours.

Q. Figuring time and one-half on this figuring your overtime is 288 hours and your lien claim statement you claim 286 hours, that would include overtime as time and one-half so that you worked at least that length of time on that basis?

A. That is right.

Q. At an agreed wage per hour?

A. Yes, \$2.66.

Q. Have you been paid anything? A. No.

Q. Have you demanded it? A. Yes.

Q. From Mr. Smith? A. Yes.

Q. Did you file a lien to secure your claim?

A. I did.

Q. I believe you stated that you went to work May 3rd? A. Yes. [87]

Q. And your last day was June 11th?

A. Yes.

Q. Is that your signature?

A. That is right.

The Court: It will be admitted as Plaintiff's Exhibit HH.

(Testimony of Arden Bell.)

Q. (By Mr. Grigsby): Mr. Bell, do you know Lee Runkle? A. I do.

Q. Did he work on that job during the period you did? A. He did.

Q. He started the same day?

A. Yes, May 3rd.

Q. Did he quit at the same time?

A. He quit one day before, that would be June 10th.

Q. He was there all of the time? A. Yes.

Mr. Grigsby: That is all.

Mr. Butcher: No questions.

Mr. Davis: If the Court please, I represent here the Wolfe Hardware and Furniture Company and the Ken Hinchey Company. I believe Mr. Butcher will now stipulate with me that the lien claims of my respective parties are correct and that it may be admitted in evidence and that the lien claim as filed are true and that the materials furnished are correct, and that the [88] material was furnished to Mr. Smith and that we are claiming no personal judgment against Mrs. Cutting. That the amount of \$13.60 was expended in filing each of these claims. I believe under these circumstances, Mr. Butcher, it will not be necessary to call any other witness to prove their claim.

Mr. Butcher: That is agreeable.

The Court: They may be admitted and marked as defendants—rather, Wolfe Hardware and Furniture Company and the Ken Hinchey Company Exhibits 201 and 202 respectively.

Mr. Kay: I have consented to making the same stipulation in regard to Alaska Plumbing Company. We claim no personal judgment on that suit against Mrs. Cutting and our dealing was with Mr. Smith, and we stipulate that the materials furnished and the amount is correct.

The Court: The claim of lien will be admitted and marked as Intervenor Alaska Plumbing Exhibit No. 300.

Mr. Grigsby: I would like to offer in evidence the claim of lien of Kennedy Hardware, which I caused to be filed myself and offer it in evidence.

Mr. Butcher: Mr. Grigsby, are you introducing this to show the cost of filing the lien claims?

Mr. Grigsby: It is to show that the lien was filed within the time.

Mr. Butcher: Our stipulation covered that, Mr. Grigsby.

Mr. Grigsby: The notes on the back of the lien is the [89] amount paid for it and which was paid by myself. I will offer it in evidence.

The Court: It will be admitted as Plaintiff's Exhibit II for the Ken Hinchey Hardware.

Mr. Grigsby: And also the claim of lien of Brady's Floor Covering and notation of the amount paid by me.

Mr. Butcher: No objection.

The Court: It may be admitted as Plaintiff's Exhibit JJ.

Mr. Grigsby: I would also like to offer the claim of lien of William Besser and have it admitted in evidence.

Mr. Butcher: No objection.

The Court: It may be admitted as Plaintiff's Exhibit KK.

GEORGE B. GRIGSBY

called as a witness herein, being first duly sworn, testified as follows:

Direct Testimony

Mr. Grigsby: My name is George B. Grigsby, Attorney at Law, Anchorage, Alaska. I would like to testify that my services in the suit of Ray Bullerdick and others for the cases here concerned is reasonably worth the amount of \$750. The claims aggregate \$3500 and there being an immense amount of work involved, especially in getting counsel together to get this case at issue. I think my services are worth \$750.

Mr. Butcher: No cross.

Mr. Grigsby: I would like to offer the lien of Lee Runkle. [90]

Mr. Butcher: No objection.

The Court: It may be admitted as Plaintiff's Exhibit LL.

Mr. Grigsby: There was a stipulation entered into as to the lien claims of the City Electric and the Alaska Paint and Glass that they claim no personal judgments against Mrs. Cutting, that they had no contract with Mrs. Cutting and all dealings were with Mr. Smith and that the liens as filed are filed as a claim of lien upon the property and City Electric lien was offered and admitted

(Testimony of George B. Grigsby.)
as Plaintiff's Exhibit MM and Alaska Paint and Glass offered and admitted as Plaintiff's Exhibit NN.

The Court: They will be so marked and admitted in evidence.

(Noon recess.) [91]

Afternoon Session

LLOYD BAXLEY

called as a witness herein, being first duly sworn, testified as follows:

Direct Examination

By Mr. Grigsby:

Q. State your name?

A. Lloyd Baxley.

Q. Are you known as A. L. Baxley?

A. That is right.

Q. Did you work for Russell W. Smith as a carpenter on the Cutting residence?

A. I did.

Q. Did you file a lien for your claim?

A. Yes, sir, I did.

Q. Is that the lien claim and is that your signature? A. Yes, it is.

Q. Now can you state, Mr. Baxley, when you went to work on that Cutting residence?

A. I went to work on May 3rd.

Q. What was the last day you worked?

(Testimony of Lloyd Baxley.)

A. June 10th.

Q. Do you remember how many hours you put in?

A. Yes, sir, I do. That was 268 hours.

Q. What was the agreed wage? [92]

A. \$2.60 cents per hours, ten cents above the union scale.

Q. That was agreed on by Russell Smith?

A. Yes, sir.

Q. He hired you? A. Yes, sir.

Q. Did you furnish any materials?

A. Yes, I did.

Q. What material did you furnish?

A. I furnished 2,000 board feet of two by four lumber.

Q. Did you furnish that for the Cutting residence? A. Yes, sir.

Q. Did you pay for it? A. I did.

Q. Did you pay for it out of your own money?

A. Yes, sir.

Q. Did that go into the construction of the Cutting residence? A. Yes, sir.

Mr. Grigsby: We offer it in evidence.

Mr. Butcher: No objection.

The Court: It—

Mr. Grigsby: For the benefit of counsel I want to state that the number of hours and the rate per hour there is a mistake in the total which reads \$728 for labor, this should be \$788. The total for labor and material is computed correctly. The

(Testimony of Lloyd Baxley.)

amount claimed in the lien is \$728. This should be \$712.88. [93] The total is \$913.88.

The Court: It will be admitted as Plaintiff's Exhibit OO.

Q. (By Mr. Stringer): Mr. Baxley, did you work on that porch which was talked about during the course of the trial? A. Yes.

Q. Were you present at the time Mr. Smith talked to Mrs. Cutting about this subsequent to the time the contract was entered into?

A. Yes, I was.

Q. Do you recall any sum of \$200 mentioned?

A. No, I don't.

Q. Did Mr. Smith state to Mrs. Cutting that he estimated that this porch would cost \$400 or more?

A. That was what I understood is right.

Q. There has been some testimony that the doors and windows didn't fit and the house leaked, do you know anything about this?

A. I didn't know and I do not see how she accounts for it.

Q. Were you there at the time the house was completed?

A. I was there at the time the carpenter's work was completed.

Q. To your knowledge the doors and windows were fitted properly so far as they could be?

A. Yes, sir.

Mr. Butcher: I object. [94]

The Court: Objection sustained. Were you there when the key was turned over?

(Testimony of Lloyd Baxley.)

The Witness: I was not there.

Q. (By Mr. Stringer): How long have you worked in the carpenter's trade?

A. Intermittently for 30 years.

Q. When Mr. Smith was around getting materials for the job and was away from the job, did he tell somebody to look after things while he was gone?

A. Yes, Mr. Runkle or myself.

Q. In other words he left somebody to look after the work?

A. That is right.

Q. (By Mr. Grigsby): Did you know Lee Runkle?

A. Yes, I did.

Q. Did he go to work the same day you did?

A. Yes, sir, he did.

Q. Did you ride with him to work?

A. No, I drove my own car.

Q. Was he working during the entire period you were?

A. Yes, he was.

Cross-Examination

By Mr. Butcher:

Q. You were present during the conversation with relation to the porch? [95]

A. Yes, sir.

Q. Where did it occur?

A. Right where it was to go on.

Q. Do you recall who was there?

A. I don't recall who was along.

Q. You remember only Mrs. Cutting?

A. That is right.

Q. You remember the conversation?

(Testimony of Lloyd Baxley.)

A. Yes, sir.

Q. What time of day was this?

A. It was in the afternoon, I couldn't name the hour.

Q. Were you advising Mr. Smith about the work?
A. No, I wasn't.

Q. Were you standing around and listening to his conversations?

A. We generally talked those things over when there was something that had to be added on.

Q. How long did this conversation occur?

A. Possibly about five minutes and then we went on working.

Q. Did you discuss the conversation with anyone last night?
A. No.

Q. Mr. Smith?
A. No.

Q. If Mr. Smith testified that he talked it over with you last night that would be untrue then?

A. We talked it over yesterday afternoon. [96]

Q. Did he mention the conversation and the figures?
A. I don't recall whether he did or not.

Q. But you remember from your own conversation and knowledge, from your own conversation—knowledge of the conversation—that it was \$400 or more?
A. That is right.

Q. You said in answer to Mr. Stringer's question that when Mr. Smith would go into town they would put you or Mr. Runkle in charge?

A. He would ask one of us, ask whichever one of us was there and if anyone wanted anything they would always ask one of us.

(Testimony of Lloyd Baxley.)

Q. While you were present on the job could anything have gone from the Cutting job to the job next door? A. No, sir.

Q. Can you work on the job next door?

A. Yes.

Q. Did you work on that job when you were working on the Cutting job? A. No, sir.

Q. You stated that both you and Mr. Runkle were put in charge as sub-foremen, do you know of any time when Mr. Runkle was in charge of the job?

A. Not at any particular time, no.

Q. Do you know of any time that Mr. Runkle was in charge of the job? [97] A. I do, yes.

Q. He just happened to be the one nearest?

A. That is right.

Q. Were you ever in Mrs. Cutting's office?

A. Yes, I have been.

Q. During the construction of the job?

A. Yes. She promised to pay the price of this material I furnished for the place and when I went up to collect it she refused to pay it.

Q. You went up to collect for the lumber you had furnished?

A. Yes, she had asked for the material and asked me to go ahead as she would pay me.

Q. Where did that conversation take place?

A. Right here in the postoffice.

Q. You told her you would furnish the material? A. Sure.

(Testimony of Lloyd Baxley.)

Q. In fact the lumber was delivered there and she knows it? A. Yes.

Mr. Grigsby: Object, not claiming any personal judgment against Cutting.

The Court: Overruled.

Q. (By Mr. Butcher): You had furnished this lumber at the request of Mr. Smith? A. Yes.

Q. And was there any special reason why you asked Mrs. Cutting [98] to pay you at this time?

A. Mr. Smith went to her and asked her this question, as far as I can tell you.

Q. You are saying now that Mr. Smith had gone to her previously? I am asking you what do you recall, did Smith tell you to go to Mrs. Cutting?

A. No, he did not. He went himself.

Q. Did he ever tell you to go to Mrs. Cutting?

A. No, he did not. She told me to come to her office and collect.

Q. You had asked her that night in the Federal Building?

A. No, I didn't ask her that night. I merely told her that in order to get the lumber they had given me credit as Mr. Smith's credit was not good and that mine is in good standing and I had furnished the lumber.

Q. She then offered to pay for it?

A. She told me that she would pay for it.

Q. You knew, didn't you, that Smith had a contract for which he was to be paid at the time of the completion of the construction?

(Testimony of Lloyd Baxley.)

A. Yes.

Q. During the construction period you had occasion to go to Mrs. Cutting's office?

A. Yes, on this lumber deal.

Q. That was to collect the money? [99]

A. Yes.

Q. You asked her and she didn't pay you?

A. That is right.

Further Direct Testimony

Mr. Grigsby: I wish to testify that in suit 5088, which is the Brady Floor Covering, Alaska Paint and Glass Company and City Electric of Anchorage, I believe that my legal services are worth the sum of \$350, and in the intervening suit of the Kennedy Hardware Company my legal services are worth the sum of \$100. That is all. Plaintiffs rest.

Mr. Davis: The Court may set my attorney's fees, if any.

Mr. McCarrey: Court may also set my attorney's fees.

RUSSELL W. SMITH

called as a witness herein, having previously been duly sworn, resumed the stand and testified as follows:

Further Redirect Examination

By Mr. McCarrey:

Q. Calling your attention to questions asked you this morning with Reference to the Anchorage Sand

(Testimony of Russell W. Smith.)

and Gravel liens and the Cinder Products Company, were those claims of lien ever paid by you?

A. No.

Q. (By Mr. Grigsby): Mr. Smith, in that sheet you furnished Mr. Kay you have the amounts owing laboring carpenters, was that computation made at \$2.56 an hour? [100]

A. I think it was.

Further Recross-Examination

By Mr. Butcher:

Q. Mr. Smith, I would like to ask you a question about that \$150 paid by Mrs. Cutting. Mr. Smith, if you recollect my asking you if Mrs. Cutting had ever paid you any money?

A. No, I don't.

Q. Remember when I asked you if the contract was \$9800 and asked if she had paid any part of it?

A. No, I don't.

Q. I asked if Mrs. Cutting had ever paid any money to you and you didn't remember that. What was that payment of \$150?

A. The \$150 was so that she could get permit and the electricity put on the property. It took all of the money.

Q. You got that in a check?

A. Yes, in a check.

Q. Do you recall whether it was a personal check or a business check?

A. From Cutting Realty, I don't recall that.

Mr. Kay: Call Lyle Anderson to the stand.

LYLE ANDERSON

called as a witness herein, being first duly sworn, testified as follows:

Direct Examination

By Mr. Kay: [101]

Q. State your name, please?

A. Lyle Anderson.

Mr. Butcher: Is this in connection with Ketchikan Spruce Mills?

Mr. McCarrey: Yes.

Q. Will you state your occupation?

A. Agent for Ketchikan Spruce Mills in Anchorage.

Q. Mr. Anderson, during last May and June, 1948, did the Ketchikan Spruce Mills furnish materials for the construction of a building on a lot described as lot 2, block 37-D of the South Addition, original townsite of the City of Anchorage?

A. They did.

Q. What are these papers?

A. These papers are copies of invoices or sales tickets that we made in our office upon delivery of the materials to this job.

Q. By whom were they prepared?

A. They were prepared by me and by Mr. Goudchaux, our bookkeeper.

Q. From the original tickets?

A. They were made from carbon copies which we keep in our office. The original slip goes to the recipient of the goods.

(Testimony of Lyle Anderson.)

Q. Is that document a true and correct statement of all the items and materials furnished, the dates, the amounts, the values and the costs of each item? [102] A. Yes.

The Court: Marked for identification Exhibit 400.

Mr. McCarrey: I ask that it be admitted in evidence.

Mr. Butcher: No objection.

The Court: It may be admitted.

Q. (By Mr. McCarrey): Now I ask you, Mr. Anderson, have you received any payment for the goods and materials furnished to this job?

A. We have not.

Q. Did you thereafter have occasion to file a lien? A. We did.

Q. I will show you this paper and ask you what it appears to be?

A. This is a copy of a lien which was filed by the Ketchikan Spruce Mills by our bookkeeper, Harry Goudchaux. It is a certified copy.

Q. When does it show that it was filed, Mr. Anderson?

A. It shows it was filed in book 20 at page 886 at 3:50 p.m.

Q. Would you state the amount that appears thereon by reason of materials furnished?

A. \$2,717.86.

Q. Is that a true and correct amount of the cost and price of the goods sold and delivered to this job? A. It is.

(Testimony of Lyle Anderson.)

Q. Has any part ever been paid? [103]

A. No. No part.

Q. Mr. Anderson, I will ask you whether or not the materials furnished appearing on Intervenor's Ketchikan Spruce Mills' Exhibit 400 actually went into construction of the house on lot 2, block 37-D?

A. Yes, it did, as I was very particular to follow this job very closely——

Q. Therefore——

A. ——and I know that every item of material delivered to the job went into the job. I followed it so closely that I refused shipment of certain amounts of lumber because I couldn't see where it was to go into the job.

Q. So you do know that all these items went into the job? A. I do.

Q. Do you know approximately what time this was?

A. It was approximately the first of May Mr. Smith came down to my office.

Q. Mr. Russell Smith?

A. Yes. Mr. Smith showed me a list of material and asked me if we could furnish that material. I checked it over and told him we could.

He stated that he had a contract to build this house. I said, "Well, fine and dandy but in order for us to deliver the material on the job it will have to be charged to the owner." I said, "We cannot charge it to you." And that the owner of the [104] lot will have to make arrangements with

(Testimony of Lyle Anderson.)

us for the purchase of that material. When that is done we will set aside that amount of material and will deliver that when it is called for, which we did. A day or two later than that Mr. Smith came back and said that Mrs. Cutting said it would be all right to charge the material to her, and so I called Mrs. Cutting on the telephone with reference to this and she said yes that she had a contract to have Mr. Smith build her house. And she said that if we would be unable to charge to Mr. Smith that we could look to her for payment. So we agreed to deliver the material.

Q. You had previous conversations with Mrs. Cutting on the 'phone? A. Yes.

Q. How did you reach her?

A. Called her at her office.

Q. Do you recall what these conversations were about?

A. Yes, I called her when we didn't receive payment on this account and told her that we would have to expect payment on the 10th of the month after the billing had been sent in.

Q. Did she offer to pay it at this time?

A. She said it would be done very, very shortly.

Q. Had Mrs. Cutting ever denied owing you this amount? A. No, at no time.

Mr. McCarrey: I would like to have this claim of lien marked for identification as intervenor's Exhibit 401. [105]

Mr. Butcher: No objection.

(Testimony of Lyle Anderson.)

The Court: It will be marked and admitted as Intervenor's Exhibit 401.

Cross-Examination

By Mr. Butcher:

Q. Mr. Anderson, in the course of your conversation with Mr. Smith did you ever discuss the contract with Mr. Cutting?

A. I was never interested in that at all.

Q. Didn't Mr. Smith tell you that he had a contract?

A. I don't recall whether he did on that particular instance or not. He brought the list of material and he explained what it was for. I asked him who it was for.

Q. He told you it was for Audrey Cutting?

A. That is right.

Q. You didn't ask about the contract?

A. No.

Q. You knew at that time that you weren't going to extend any credit to Russell Smith?

A. That is right.

Q. You intended to watch every piece of material that went over there? A. That is right.

Q. Have you had particular experience with this particular contractor and was not going to extend him any credit? [106] A. Yes, sir.

Q. Because of your experience you couldn't let it go? A. That is right.

Q. When you called Mrs. Cutting on the tele-

(Testimony of Lyle Anderson.)

phone you told her that she would have to go good for it?

A. I told her that was the only way we could deliver it. They would be charged to her as owner.

Q. Do you know she was the owner?

A. To the best of my knowledge, yes.

Q. You assumed she was the owner, didn't deny it, you didn't ask that?

A. She said she had a contract with Mr. Smith and that he was building the house for her.

Q. Didn't she state that the contract was to be paid when the house was completed?

A. I never entered into that at all because I wasn't particularly interested.

Q. This was an open account, wasn't it?

A. That is right.

Q. It was delivered over a period of time?

A. That is right.

Q. Do you expect any material delivered should be paid for on or before the 10th?

A. We would expect payment on the 10th of June following delivery in May. [107]

Q. Do you recall from your own knowledge in charging in this account, whose name is placed at the top of the bill?

A. Audrey Cutting is placed at the top of the bill.

Q. Are you certain? A. I am positive.

Q. Does Russell Smith at any time appear?

(Testimony of Lyle Anderson.)

A. At no place unless as a receiver of the material on the page.

Q. Does Mr. Smith ever come and discuss the indebtedness with you?

A. No, not to my knowledge.

Q. Could you produce one of the bills so that we can see for ourselves whether you did actually bill Mrs. Cutting or Mr. Smith?

A. I am sorry. I do not have any with me.

Mr. Kay: We will furnish one this afternoon.

The Witness: I would like to have the statement returned to our office this evening.

Q. (By Mr. Butcher): Would you explain what this paper is?

A. This is a copy of a statement put out by our posting machine. This shows the original account and this was the way it was headed in our ledger sheet.

Q. You made this copy when?

A. This morning. [108]

Mr. Butcher: This may be a little irregular but I would like to call Mr. Kay.

WENDELL W. KAY

called as a witness herein, being first duly sworn, testified as follows:

Direct Examination

By Mr. Butcher:

Q. State your name, please?

(Testimony of Wendell W. Kay.)

A. Wendell W. Kay.

Q. You are a practicing lawyer?

A. Yes, sir.

Q. Situated at Anchorage? A. Yes, sir.

Q. Did you prepare bankruptcy proceedings for Mr. Russell Smith? A. I did.

Q. You are familiar with all the debts of Mr. Smith?

A. Not to too many, Mr. Butcher. As a matter of fact, Mr. Smith dealt 80 per cent of his time with our law clerk, Dan Cuddy.

Q. You did examine the papers?

A. I did.

Q. You have some idea of the assets that Mr. Smith had, if any?

A. Without my file I can't state positively.

Q. Did he have any assets? [109]

A. To the best of my recollection he had few and far between. He had a lot of debts.

Q. Did you look on the dates sworn to by Mr. Smith and determine whether the Ketchikan Spruce Mills is shown and what this amount is that is shown?

A. I will do my best. Yes, Mr. Butcher, there is an entry right here for the claim of Ketchikan Spruce, \$2810.29.

Q. Isn't that the same amount claimed by Ketchikan Spruce Mills, \$2,717.86?

A. I believe it is the amount. Could I have the lien claim of the Ketchikan Spruce Mills?

(Testimony of Wendell W. Kay.)

Mr. Butcher: Your Honor, can you tell me approximately the difference between the two?

The Court: I would say off-hand there was about \$92.

Q. (By Mr. Butcher): Now, Mr. Kay, has the bankrupt been adjudicated? A. Yes, sir.

Q. And of your own knowledge as attorney for the bankrupt, has the Ketchikan Spruce put in a claim certifying to the amount owing?

A. I do not believe that the Ketchikan Spruce Mill has filed any claim in the Smith Bankruptcy Claim. I believe they did file a claim in the bankruptcy proceedings with regard to a small item on Seifert's property but that is my recollection.

Q. The amount of claim against the Seifert property, is that [110] \$93?

A. I believe it was \$92.

Q. It would be your recollection that the Seifert claim would be around \$93? A. Yes.

Q. You have no knowledge that Ketchikan Spruce Mill has filed a claim in the bankruptcy proceedings? In as much as the Cutting job is concerned?

A. I don't believe they have.

Q. You don't know? A. No.

Q. Your answer is "No"? A. Yes.

LYLE ANDERSON

called as a witness herein, having previously been duly sworn, resumed the stand and resumed testifying as follows:

Cross-Examination
(Continued.)

By Mr. Butcher:

Q. Mr. Anderson, you brought with you the records that I requested? A. Yes.

Q. I will ask you, Mr. Anderson, if the method of billing as shown by the bill he has before him was the usual procedure? A. Yes, sir. [111]

Mr. Butcher: Your Honor, would you care to look at them?

The Court: Perhaps I had better since some testimony has been given concerning them.

Q. (By Mr. Butcher): Mr. Anderson, would you explain what is shown on this bill dated May 31, 1949, "Sold to Audrey Cutting, 410 H Street"?

A. Total amount \$347.68. At the bottom appears the signature of Russell W. Smith.

Q. Mr. Anderson, did you ever file a certified claim in connection with the bankruptcy of Russell Smith?

A. I believe we filed one claim for less than \$100 in connection with Russall Smith for some work he had done for Major Seifert. We did that in connection with the lien we had filed against Major Seifert's property.

Q. There is an item on Mr. Smith's bookkeeping

(Testimony of Lyle Anderson.)

record showing Ketchikan Spruce Mills, \$92.43, is that the correct amount?

A. I would presume so, although I don't know the exact amount.

Q. Did you file any claim in connection with the Cutting home? A. Absolutely not.

Q. You did not? A. No.

Mr. Stringer: If the Court please, as intervenor in cause A-5087 as Trustee in Bankruptcy the allegations in our complaint filed in Court state that Mr. Smith did file voluntary bankruptcy; [112] that Mr. Stringer was appointed the Trustee on the 12th day of August; that Mr. Russell W. Smith entered into the contract that has been introduced on the 30th day of April. I will stipulate as to this and other items which have been put in evidence.

RUSSELL W. SMITH

called as a witness herein, having previously been duly sworn, resumed the stand and testified as follows:

Further Redirect Examination

By Mr. Stringer:

Q. Mr. Smith, in your complaint you have prayed for the sum of \$10,500 for work done and materials and supplies furnished, and services rendered, have you made demand on Mrs. Cutting here for this amount of money? A. No.

Q. You have never asked her to pay?

(Testimony of Russell W. Smith.)

A. I have asked her a few times.

Q. Have you ever received any money from the contract? A. No.

Q. You have testified earlier that this \$10,500 represents \$9800 embraced in the original contract and that there was an additional \$700 for materials and laborers performed after the original contract was entered into, and that \$450 of this \$700 was for building an additional porch on the back of the house? A. That is correct.

Q. What does the remaining \$250 represent?

A. The \$250 left is the blue prints which I had to get.

Q. Who was to furnish them?

A. According to the contract Mrs. Cutting was to pay for the blueprints.

Q. Did she pay for those? A. No.

Q. Who furnished them?

A. I furnished them myself.

Further Recross-Examination

By Mr. Butcher:

Q. Mr. Smith, is it not a fact that in a contract entered into by an independent contractor and the owner that it is up to the contractor to get the electricity and start the job going?

A. It is up to both parties.

Q. Was this included in your contract with Mrs. Cutting? A. No, it is not included.

Q. That was independent of it?

(Testimony of Russell W. Smith.)

A. Yes, sir.

Mr. Butcher: That is all. Call Mr. Smith as my own witness.

RUSSELL W. SMITH

again called as a witness herein, having previously been duly sworn, resumed the stand and testified as follows:

Direct Examination

By Mr. Butcher:

Q. Mr. Smith, you have heard considerable testimony previously that among other debts in your bankruptcy was an item which covered the amount owed Ketchikan Spruce Mills on the Cutting job?

A. Yes.

Q. Did you consider, Mr. Smith, did you recognize that as a debt from you to the Ketchikan Spruce Mills?

A. I had to put it in the bankruptcy bill.

Q. You considered that you owed them the money?

A. This—it had to come out of the property somehow.,

Q. Did you discuss it with Mr. Anderson?

A. No, I didn't.

Q. Were you ever called upon by Mr. Anderson to pay that money? A. No.

Q. You have heard Mr. Anderson testify in the witness stand as to his conversations, that he did

(Testimony of Russell W. Smith.)

not look to you to for payment but did look to Mrs. Cutting, is that substantially correct?

A. Yes.

Q. Had any work been performed on the job prior to contract? Prior to the entering into of the contract on April 30th?

A. Not to my knowledge.

Q. Isn't it a fact that you insisted on a contract before doing any work?

A. That is correct. [115]

Q. You drew that contract?

A. The contract was drawn up by McCarrey.

Q. By Mr. McCarrey and at your request?

A. Yes.

Q. Had you had any previous discussions relative to the work to be performed out there with Mrs. Cutting?

A. I had showed her the plans.

Q. How come did you build the house?

A. I was up to her house one day and talking over building and I brought some plans and she picked one out and said that she would like to have it built.

Q. You had some discussion about the place to be built and the relative cost, did you?

A. Yes.

Q. And you came to some meeting of the minds and you decided to put this into a written contract?

A. Yes.

Q. No work had been done prior to this time?

(Testimony of Russell W. Smith.)

A. No.

Q. You are sure of that or could you have sent Ken Hinchey out there at an earlier period before April 30th?

A. I don't remember exactly the date he went out there. He was out on the job a little before I started construction.

Q. In other words he was out there before you started the construction? [116] A. Yes.

Q. Mr. Smith, your lien claim alleges that on the 23rd day of April work was commenced on the property. Your contract wasn't signed until the 30th, does that refresh your mind that you had Ken Hinchey out there before the contract was signed?

A. I am not sure whether it was before.

Q. Could it have been before the contract was signed? A. It could have been.

Q. You must have had some verbal consent on the part of Mrs. Cutting? A. Yes.

Q. When the contract was signed and the figure of \$9800 determined by you, that figure was to cover everything, was it not? A. That is correct.

Q. That figure covered both labor and materials furnished? A. That is correct.

Q. Does that figure, \$10,500, which you are now claiming cover the amount put in your bankruptcy petition—include the amount of \$2,2117 for the Ketchikan Spruce Mills?

A. I am not sure.

(Testimony of Russell W. Smith.)

Q. It did cover it? A. Yes.

Q. If you had received the \$10,500 as you have alleged and [117] demanded, you could have paid off everybody including the Ketchikan Spruce Mills?

A. I couldn't recollect. I would have to see the books.

Q. Within a few days after your finished the construction you went into bankruptcy, did you?

A. Yes.

Q. Did you ever demand the sum of \$13,500?

A. Not to my knowledge.

Q. Do you recall demanding any sum above \$10,500? A. Not to my knowledge.

Q. And you have seen this before, Mr. Smith, do you know of your own knowledge whether the totals represent the figure of \$10,500 or \$12,934?

A. There is no figure on here.

Q. This represents the total amount of work for Mrs. Cutting? A. As far as I know.

Q. You have previously alleged that the amounts are true and accurate. You have demanded the amounts set forth from Mrs. Cutting. Was that amount exceeding \$10,500?

A. I don't recall what they were. The book-keeper handed her the figures.

Q. You don't recall what they were?

A. No.

AUDREY CUTTING

called as a witness herein, being first duly sworn, testified [118] as follows:

Direct Examination

By Mr. Butcher:

Q. Your name is Audrey Cutting?

A. That is correct.

Q. You are one of the defendants in this action?

A. I am.

Q. You are the mother of Sylvia Henderson?

A. That is correct.

Q. She is a minor? A. Yes.

Q. Her age at the present time?

A. 17.

Q. You know Mr. Smith who has previously testified here? A. Yes, certainly.

Q. You entered into a contract with Mr. Smith, which contract has been admitted in evidence, to construct a certain residence on a lot owned by you? A. That is correct.

Q. Entered into on the 30th day of April?

A. That is correct.

Q. By the terms of that contract, Mr. Smith was to construct a residence according to certain plans and specifications and that you were to pay him a certain price? A. Yes. [119]

Q. That price was \$9,800?

A. That is right.

Q. You had had some dealings in connection

(Testimony of Audrey Cutting.)

with the lot—lot No. 2, block 37-D, South Addition to the original townsite of Anchorage and you had entered into a contract previously to purchase that lot? A. Yes.

Q. Did you enter into that personally or was it with Sylvia Henderson?

A. I can't remember. It seems that it was with her.

Q. You were to keep a signed copy of the contract? A. That is right.

Q. This was drawn by the firm of McCutcheon and Nesbett? A. Yes.

Q. Do you recall any circumstances in connection with the purchase of this lot?

A. The price of the lot was \$1800 and I paid \$300 down and then \$50 a month. The payments were to be \$50 per month plus 6 per cent interest. This contract was made with Mr. Thomas—Ralph Thomas.

Q. Did you make these payments yourself?

A. Yes.

Q. They were not made by your daughter, Sylvia Henderson? A. No.

Q. Was there a deed executed at the time the contract was made? [120]

A. That is correct. The deed was in escrow and put with the bank.

Q. Which bank?

A. Union bank.

Q. You made the payments? A. Yes.

(Testimony of Audrey Cutting.)

Q. You made them in accordance with the due date?
A. Yes.

Q. Monthly?
A. That is right.

Q. Did you ultimately complete payment for the lot?
A. Yes.

Q. Without any break in any payment?

A. I don't believe I missed any payments.

Q. You made the payments then without default?
A. Yes.

Q. Was there a default clause?

A. Yes.

Q. What did it provide?

A. It said that in case of default the lot would go back to the original owner.

Mr. Grigsby: Objection.

The Court: Objection sustained.

Q. (By Mr. Butcher): Was there a provision in the contract providing about the [121] taxes?

A. That is correct.

Q. Did you personally pay those taxes?

A. Yes, I did.

Q. Did Mr. Thomas exercise any control or show any interest in the property after the time you entered into the real estate contract?

A. I have only had one visit with Mr. Thomas since that time.

(Short recess.)

Q. (By Mr. Butcher): Mrs. Cutting, do you recall the date you completed payment for the property?

(Testimony of Audrey Cutting.)

A. The contract was paid in full in approximately July 1st, 1948.

Q. You then received delivery of the deed?

A. That is correct.

Q. In whose name is the deed?

A. Sylvia A. Henderson.

Q. Do you have a copy of that deed, Mrs. Henderson? A. Yes, I do, in my files.

Q. Will you look at your papers and try to find a copy of the deed? You have the deed?

A. Yes, I do.

Q. Do you recognize it as a deed which was placed in escrow and executed at the time of the contract? [122]

A. Yes.

Q. Was that deed ever recorded?

A. The deed was recorded on August 4, 1948, at 2:20 p.m.

Q. Who recorded the deed?

A. Rose Walsh.

Q. Who delivered the deed for recording?

A. I did.

Q. It was done at your request?

A. That is correct.

Q. Had you personally received this deed from the bank? A. Yes, sir.

Mr. Butcher: At this time I would like to have this deed marked for identification.

The Court: It may be admitted as Defendant's Exhibit 101.

(Testimony of Audrey Cutting.)

DEFENDANT'S EXHIBIT No. 101

Warranty Deed

This Indenture, made this 30th day of November, 1946, by and between Ralph R. Thomas, of Anchorage, Alaska, party of the first part, and Sylvia A. Henderson, of the same place, party of the second part,

Witnesseth:

That the party of the first part for and in consideration of the sum of Ten Dollars (\$10.00), lawful money of the United States of America, and other good and valuable considerations to him in hand paid this day by the said party of the second part, the receipt of which is hereby acknowledged; has granted, bargained, sold and conveyed and by these presents does grant, bargain, sell and convey unto the said party of the second part, her heirs, assigns, executors and administrators, the following described real property situate in the Territory of Alaska, Third Division, Anchorage Recording Precinct, and more particularly described as follows, to wit:

Lot Two (2) in Block Thirty-Seven D (37-D) of the South Addition to the Townsite of Anchorage, Alaska, according to the map and plat of the Welch Subdivision, which map and plat is on file in the office of the United States Commissioner and Ex-Officio Recorder

(Testimony of Audrey Cutting.)

for Anchorage Recording Precinct, Anchorage,
Alaska,

Together With All and Singular, the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining. However, this deed is given under the specific restrictions that the party of the second part will, within a period of two (2) years from the date of this deed, commence construction of a dwelling to cost not less than Five Thousand Dollars (\$5,000.00) and conditioned upon the completion of such dwelling house within a reasonable length of time after its commencement, taking into consideration the availability of materials and labor. In the event that the party of the second part, her heirs or assigns, shall fail, neglect, or refuse to commence the building above described within the time herein limited, or in the event she shall commence the building but not carry the same to completion within a reasonable length of time, then the party of the first part, his heirs or assigns, or any person owning property adjacent to the above-described property shall be entitled to commence and prosecute proceedings at law or in equity against the person or persons violating or attempting to violate the restrictions and conditions above described. Such action may be to prevent the party of the second part, her heirs or assigns, from violating the conditions of this deed or to recover damages for such violation, or for both an injunction or damages.

(Testimony of Audrey Cutting.)

To Have and To Hold the said premises, all and singular, together with the appurtenances and the privileges incident thereto unto the said party of the second part, her heirs and assigns, forever: And the said party of the first part hereby covenants and agrees with said party of the second part that he is the lawful owner of said property; that he has legal right to sell the same, that there are no liens or other encumbrances against said property; and the party of the first part does by these presents warrant and will forever defend said party of the second part, her heirs and assigns, against any and all persons having or claiming any right, title or interest therein by any lawful claim, in the quiet and peaceable possession thereof.

In Witness Whereof, the said party of the first part has hereunto set his hand and seal the day and year first hereinabove written.

[Seal] /s/ RALPH R. THOMAS.

Witnesses:

 /s/ MRS. ALBERTA MOORE,

 /s/ MARY JANE SQUYRES.

United States of America
Territory of Alaska—ss.

This Is To Certify that on this 30th day of November, 1946, before me, the undersigned, a Notary Public in and for the Territory of Alaska, duly commissioned and sworn as such, personally came

(Testimony of Audrey Cutting.)

Q. Were they later set forth?

A. Yes. As a matter of fact the contract was typed twice before signing.

Q. Were there any other agreements in connection with this building that were not set forth in your contract? A. None.

Q. Other than the porch?

(No response.)

Q. Had you placed any of the main parts of the construction out on competitive bids at that time?

A. No, sir.

Q. You dealt only with Mr. Smith?

A. Yes, sir.

Q. He agreed to build the house in accordance with the plans and so forth for the sum of \$9,800?

A. Yes, sir.

Q. You have heard previous testimony in connection with the construction of the porch. Have you ever been requested by Mr. Smith to have this porch built?

A. Yes, Mr. Smith brought it to my attention.

Q. Was this at the beginning or toward the end of construction?

A. It was toward the end. [124]

Q. Did it cause a change or alteration of the plans you had for the house?

A. Yes, it did.

Q. Did you want the porch? A. No.

Q. But you did agree to its being constructed?

A. Yes, sir.

(Testimony of Audrey Cutting.)

Q. Will you tell the Court the amount involved as you recall it?

A. The amount that Mr. Smith and I discussed was no more than \$200. In fact, I informed him that if it were to cost more than \$200 that I did not want him to build it and I certainly did not agree to \$400 or \$500 for a porch. It is only useless space.

Q. Where did this conversation take place?

A. The conversation took place in my office.

Q. Was it in your office that Mr. Smith came to you and told you about the porch?

A. Yes, sir.

Q. Anyone with him? A. No, sir.

Q. He was alone? A. Yes, sir.

Q. Were there any conversations out at the premises? A. No, sir. [125]

Q. There were no conversations as to the cost of constructing the porch?

A. No, there was no financial conversation between Mr. Smith and his employees.

Q. Do you know Mr. Runkle?

A. I am not familiar with anyone except Mr. Baxley.

Q. Was he ever present when you talked with Mr. Smith about this porch? A. No.

Q. You heard Mr. Baxley testify that you had a conversation about some lumber he was furnishing, was this conversation in the post office?

A. Yes.

(Testimony of Audrey Cutting.)

Q. What was this conversation about?

A. Mr. Baxley just confirmed the statement that he had used his two by four lumber on the house.

Q. Did he ever come up to your office and demand payment? A. Yes, he did.

Q. What was the nature of the conversation?

A. I informed Mr. Baxley that inasmuch as that was covered by the contract and that it was not to be payable until the house was completed that I would not pay him at this time.

Q. After you had had these preliminary conversations with Mr. Smith and before the contract was actually drawn, do you know whether you had informed Mr. Smith to perform any work [126] on the premises? A. No.

Q. Did you ever give Mr. Smith consent to start construction before signing the contract?

A. No, I did not.

Q. Do you have any knowledge of Mr. Hinchey going on the premises and doing some excavating as early as the 23rd of April?

A. No, I did not.

Q. Do you know of any construction prior to the signing of the contract? A. No.

Q. Now, I understand that you signed the contract as owner, is that strictly true?

A. Not in a true sense as being owner but being as a guardian.

Q. Every cent that went into the house it was your money? A. Yes.

(Testimony of Audrey Cutting.)

Q. What position do you assume in connection with your daughter?

A. Well, I had been granted custody and was the guardian and I more or less——

Q. In other words you represented her in various capacities? A. That is correct.

Q. Did you ever consult with an attorney at the time this contract was entered into about your legal rights in connection [127] with the premises?

A. Yes, sir.

Q. And did you ever receive any advice about the posting of notices? A. Yes.

Q. What kind of notices were you given advice on? A. I was asked to post lien notices.

Q. Did you post those notices?

A. Yes, sir.

Q. I hand you a piece of paper and ask you to look at it and identify it?

A. It is a lien notice that I had drawn up in my office?

Q. What was the purpose of it?

A. The lien notice was to notify all the subcontractors and laborers and anyone supplying material that I nor my daughter Sylvia Henderson was responsible for any of the liens or bills for the building or construction of this home on lot 2, in block 37-D in the South Addition of the townsite of Anchorage.

Q. And did you put up more than one notice?

A. Yes, there were four notices.

(Testimony of Audrey Cutting.)

Q. Is this one of the notices? A. Yes.

Q. Does your signature appear there?

A. Yes, sir.

Q. Does the signature of your daughter appear there? [128] A. Yes, sir.

Mr. Butcher: I ask that this be admitted as Defendant's Exhibit No.—

The Court: Admitted as Defendant's Exhibit 102.

Q. (By Mr. Butcher): Mrs. Cutting, you say you posted four of these notices?

A. Yes, sir.

Q. You posted them on the date that is shown on that paper?

A. That is the first day of May. Yes, sir.

Q. Do you recall where on the premises you posted these notices and did you post them personally? A. Yes, I did.

Q. Where?

A. I posted one on the box—the carpenter's box and the box that was used by the carpenters. The first notice was nailed on it, as I recall, on a carpenter's box where the carpenters kept their tools and locked them up and generally any other thing they have on the grounds.

Q. Could that have been the contractor's tool box?

A. Yes. There was lumber on the property and two of the notices were nailed on the lumber and the last notice was saved and when the basement

(Testimony of Audrey Cutting.)

was completed it was posted on the middle support beam of the basement.

Q. Did you post that notice yourself?

A. Yes, sir. [129]

Q. Do you recall whether there was a telephone or electrical post on the property?

A. Not right away there wasn't.

Q. Was there ever one on the property?

A. I had to put a post there for a power unit.

Q. Do you recall that post?

A. Yes, I do.

Q. You just used the four notices?

A. That is true.

Mr. Butcher: Is it generally proper to read the lien notice at the time it is introduced?

Lien Notice

Be It Known that I, Audrey Cutting, guardian of Sylvia A. Henderson, a minor child of Anchorage, Alaska, will not be responsible for any liens or bills for the building or construction of home located at and on Lot Two (2) Block Thirty-Seven-D (37-D), South Addition, Anchorage, Alaska. On the 30th day of April, 1948, a contract was entered into by and between Audrey Cutting and Russell W. Smith, contractor, to build a home located on Lot 2, Block 37-D, South Addition, Anchorage, Alaska, according to specifications as covered by contract.

You are hereby notified that Audrey Cutting, and as guardian of minor child, Sylvia A. Henderson,

(Testimony of Audrey Cutting.)

neither, Audrey Cutting nor Sylvia A. Henderson will not be responsible for any liens or bills in the said construction of the above home, arising [130] from the plumbing, or electrical fixtures or work, or material used in construction of home, or labor of any sort.

You are hereby notified that Audrey Cutting and Sylvia A. Henderson will not be responsible for any injuries or deaths to employees arising from the construction of said home by Russell W. Smith, Contractor of Anchorage, Alaska.

Dated this 1st day of May, 1948, at Anchorage, Alaska.

/s/ AUDREY CUTTING,

/s/ SYLVIA A. HENDERSON.

A. The other lien notices, I don't know what happened to them.

Q. Did you look for them?

A. Yes, I have.

Q. On the premises?

A. Yes, that is correct..

Q. Do you recall where you got this notice?

A. I got this in the basement.

Q. Whereabouts in the basement?

A. It was taken down from the pole and Mr. Fox, the gentleman who rented the home after it was completed, found it and then gave it to me.

Q. You got this form after Mr. Fox rented it?

A. Mr. Fox knew that I had considerable arguments and he was present and he himself could see

(Testimony of Audrey Cutting.)

that there had been a number [131] of things that hadn't been done; naturally, anything pertaining to the construction of the house he gathered up and put them on the side for me to keep.

Q. After progress had commenced on the job did you have occasion to discuss with Mr. Smith the procurement of any materials on the job?

A. What do you mean?

Q. Did Mr. Smith have any difficulty getting materials? A. Yes, sir.

Q. Do you recall Mr. Waldron coming to see you about materials? A. Yes, sir.

Q. You heard Mr. Waldron testify that he didn't want to extend any credit to Smith?

A. Yes.

Q. Is that true?

A. No, it is not true.

Q. What did Mr. Waldron discuss with you there?

A. Mr. Waldron came to see me in my office and we discussed quite at length the conditions of the contract and he read the contract and he wanted to know if Mr. Smith had the contract and it was a confirmation of the contract rather than who was going to pay the bill.

Q. Did you ever agree to assume responsibility for the bills for the materials?

A. No, sir. I never agreed to make any particular guarantee [132] on any of the bills.

Q. You showed Mr. Waldron the contract then?

(Testimony of Audrey Cutting.)

A. Yes, sir, Mr. Waldron didn't doubt my ability to pay Mr. Smith.

Q. You heard Mr. Lyle Anderson of the Ketchikan Spruce Mills testify as to the telephone conversation with you in which he discussed the credit of Mr. Smith and asked if you would assume responsibility and what did you tell him under the circumstances?

A. Mr. Anderson called me and I gave him the same particulars of the contract as I had given Mr. Waldron and he just asked me if I were going to pay the contract. He said he would wait on payment by Mr. Smith.

Q. Did you ever get any bills from Mr. Anderson?

A. No, sir, not until after the house was completed and the conversation concerning the liens and he said he was holding me responsible after the construction.

Q. Do you recall when you received the first bill?

A. It was in the latter part of July.

Q. It was after the construction was completed?

A. Yes, sir.

Q. Was there any understanding that you were to pay before the 10th day of June?

A. No, sir.

Q. That didn't occur in the conversation?

A. No, sir. [133]

Q. You made no guarantee to Mr. Anderson as to the payment of these bills?

A. No, sir.

(Testimony of Audrey Cutting.)

Q. Was the progress on the building satisfactory to you? A. Yes, sir.

Q. Did you always find Mr. Smith there?

A. Not always.

Q. You generally had no dissatisfaction with his progress? A. That is right.

Q. What was your first dissatisfaction with the building?

A. Before Mr. Smith presented the bill to me, you remember we had quite a bit of rain somewhere along about that time. There was quite a considerable cloudburst. It rained one day and one night continuously. There was a seeping in the side walls, front and back walls, and not only just through the windows but the bricks themselves, which indicated to me that he hadn't put in waterproofing material on the bricks when they put the bricks up or that the ground hadn't been covered properly around the foundation of the house and which I called to Mr. Smith's attention and we had considerable arguments over it.

Q. Did he agree at that time to take care of the defects?

A. Yes, he had started to—I went over and took his spade and cleaned some of the dirt out around some of the windows. Some of the gravel was showing underneath the porch which would [134] seem to give away unless something was done to support it.

Q. Were they taken care of? A. Partly.

(Testimony of Audrey Cutting.)

Q. Did you ever receive a demand for payment?

A. He demanded his payment.

Q. Do you remember the date?

A. Payment was demanded shortly. We have all been rather confused just on the dates. That is why I asked you this morning as to what dates the liens had been put in on the property by the employees because it was ten days before that that payment had been asked for.

Q. Did he demand the total amount of \$13,500?

A. Yes, and Mr. Smith indicated that he was giving me quite a bargain. He didn't include ten per cent contractor's fees and didn't include his own labor against the place.

Q. Did you offer at that time to give him the \$9,800 plus the \$200 in full settlement in accordance with the terms of your contract?

A. I was willing to give him the \$10,000 and explained what was going on out there that he had considerable work to straighten out besides the basement and I wanted that done before I made any payment of any sort.

Q. Have you always been ready, willing and able to pay it now? A. Yes, sir. [135]

Q. Are you ready to pay at any time?

A. Yes, at any time.

Q. Has he been able to explain in any way the reason for having exceeded the amount set forth in the contract?

A. No, except that it cost him more than he thought it was going to cost.

(Testimony of Audrey Cutting.)

Q. He didn't ask you to waive the contract?

A. No, sir.

Q. Do you recall anything about who drew the plans for the house?

A. I don't know. Mr. Smith presented the plans to me.

Q. Was there any provision made for a porch in connection with these plans? A. No, sir.

Q. Who examined the plans—yourself?

A. Yes, sir.

Q. Did you ever set forth in writing and agree to have the porch on it? A. No, sir.

Q. That agreement was verbal?

A. Yes, sir.

Q. Were the plans in existence at the time the contract was signed? A. Yes, sir.

Q. Was there any amount or any price marked on the plans? [136] A. No, sir.

The Court: The trial will stand in adjournment until tomorrow morning at 10:00 o'clock, a.m. [137]

Thursday, February 10, 1949

AUDREY CUTTING

called as a witness herein, having previously been duly sworn, resumed the stand and testified as follows:

Cross-Examination

By Mr. Grigsby:

Q. Mrs. Cutting, this lien notice that you testified about is dated the first day of May, 1948, is

that the date you posted it? A. Yes, sir.

Q. And did you post four of them on that one day? A. Three of them.

Q. And where did you post the first one?

A. The first one was posted on the carpenter's tool box.

Q. Is that the tool chest that remained there during the entire construction?

A. I believe so.

Q. Where was it?

A. It was at the back of the house known as the back half of the lot.

Q. Was it between the house you were building and the house of the Seifert residence?

A. No, I don't say so specially.

Q. Where is the Seifert residence from your residence? A. South. [141]

Q. Was the box on the south end of your lot? The south side toward the Seifert house?

A. No.

Q. Where was it on your lot?

A. On the back half of the lot.

Q. Which direction?

A. Well, it would be a westerly direction.

Q. Your house faces on the east?

A. The lots run east and west.

Q. What street is your house on?

A. H Street.

Q. It faces on H Street, does it?

A. Yes, it faces on H Street.

(Testimony of Audrey Cutting.)

The Court: Which side? Is it on the west side or east side of H Street?

The Witness: It is on the west side of H Street.

Q. (By Mr. Grigsby): You posted one of these notices on the carpenter's tool box?

A. That is correct.

Q. And one on some lumber? A. Yes.

Q. And the third the same day on another lumber pile? A. That is right.

Q. What kind of lumber was it? [142]

A. General lumber, siding, shiplap.

Q. You know you went out and posted these notices on the lot on the same day you wrote them which was on the first of May?

A. That is right.

Q. The day after you signed the contract?

A. That is right.

Q. When did Sylvia Henderson sign it?

A. The day I had it typed.

Q. Did you type it yourself? A. No.

Q. Did a lawyer type it for you? A. No.

Q. Who did type it? A. Mrs. Sollee.

Q. Is she in town now? A. Yes, sir.

Q. Did she type all four statements—four at the same time? A. Yes, sir.

Q. Were they all originals?

A. One original and three copies.

Q. This is an original, is it not?

A. Yes, sir.

(Testimony of Audrey Cutting.)

Q. And this is the one which was turned over to you by Mr. Fox? A. Yes, sir. [143]

Q. After he moved in? A. Yes, sir.

Q. That was sometime in July, 1948?

A. Yes, he turned that over with some other papers.

Q. This is the one you posted later in the basement?

A. Yes, which was on the middle post.

Q. How long was it after you posted the first three did you post the one in the basement?

A. I just can't recall, some carpenter work—carpenter work hadn't been done in the basement.

Q. Carpenter work hadn't been done in the basement? A. Yes.

Q. Just where did you post it?

A. I posted it several times. It was on the floor and I put it back up again.

Q. And you put it back up again in the same place? A. Yes, sir.

Q. Where was that place in the basement?

A. It was on the middle frame post. That was the beam support for the floor of the basement.

Q. What was the dimensions of it?

A. What do you mean—the dimensions of it?

Q. What was it—six by six or what?

A. I didn't take the measurements of the post, Mr. Grigsby. [144]

Q. Was it big enough to hold the whole paper?

A. What do you mean?

(Testimony of Audrey Cutting.)

Q. So that the paper protruded? Was it protruding or was it in the center?

A. No, it wasn't in the center.

Q. Where was this post?

A. It would be the first post on your way to the middle of the basement. There are only two posts.

Q. Were they in the center?

A. Well, not exactly center, no.

Q. Was there any floor laid when you posted this? A. No.

Q. What did you tack it up with?

A. Tacks.

Q. One at each end as shown here?

A. No, in the middle.

Q. You mean the middle of the end?

A. No, the middle and the top.

Q. There weren't any in the corner?

A. No.

Q. You state that you found it on the floor?

A. That is right.

Q. How many times did you do that?

A. Twice that I know of. It was out in the yard once.

Q. Did you ever call anybody's attention to that notice? [145]

A. Yes, Mr. Smith's. Mr. Smith told me he had posted notices to the effect that he was the contractor on the job.

Q. Say that again, please?

(Testimony of Audrey Cutting.)

A. Mr. Smith stated that he had posted notices around the premises to the effect that he had accepted the contract and was building the house for me.

Q. Where? A. All over the place.

Q. When did you find out he was posting notices?

A. Very soon after the construction started.

Q. But you posted your notices before any construction started on the tool box and lumber piles?

A. It is necessary to post them as fast as possible.

Q. Have you signed this contract on the 30th of April, 1948, and posted one of these notices on the first day of May on the tool box and one on each of two lumber piles? A. Yes, sir.

Q. When did you discover his notices were posted?

A. About the same time that I posted these.

Q. Did you tell him that inasmuch as he saw fit to post notices that you would post them also?

A. Yes, sir.

Q. Because he had posted notices?

A. Not necessarily.

Q. You posted these notices to inform everyone that you had [146] a contract with Mr. Smith and did you discuss this notice with Mr. Smith?

A. Not particularly, not in detail.

Q. Did you inform him that you posted notices

(Testimony of Audrey Cutting.)

to show that you personally wouldn't be responsible?

A. I didn't discuss that with him.

Q. Do you know how long it remained on that tool box? A. No, I don't.

Q. Did you ever see the notice on that tool box?

A. I did pick them up and put them back up again.

Q. Did you put it back on the tool box?

A. I believe so. But I did pick one up and put it back on a lumber pile. In other words, I made every effort to inform all concerned that Mr. Smith was building the house for me and that my daughter and I were not responsible for any bills.

Q. Were these carpenters working out there around this box? A. No, sir.

Q. There was nobody there? A. No.

Q. How often did you go out there?

A. Once in a while I would be going through the neighborhood on errands.

Q. Did you ever tell any carpenter at any time that you wouldn't be responsible for his wages?

A. Yes, sir. [147]

Q. Which one? A. Mr. Baxley.

Q. When did you tell him that?

A. Before the job was begun.

Q. Before the job was started?

A. That is correct.

Q. Before you made the contract?

(Testimony of Audrey Cutting.)

A. No, sir.

Q. After you made the contract?

A. Yes, sir.

Q. Where? A. In my home.

Q. Was that prior to the time that you posted the notices?

A. Oh, yes, that was a month before.

Q. Month before? A. Yes, sir.

Q. Did you ever tell any other carpenter that you wouldn't be responsible for his wages?

A. No, I didn't.

Q. How did you come to be talking to Baxley months before this contract was let to Smith and that you weren't going to be responsible for any claims?

A. Mr. Smith had done other carpenter work for me at my home and through him I came into contact with Mr. Baxley.

Q. And you were discussing a contract on that job at that [148] time?

A. Yes, Mr. Smith approached me about building a home on the lot because of the progress in the City of Anchorage.

Q. And you told Mr. Baxley on that occasion that if you did do it that you wouldn't be responsible?

A. No, I told him that if I had a contract it would be Mr. Smith and that it would be subject to Mr. Smith's orders and directions and not mine.

Q. You told him that you wouldn't be respon-

(Testimony of Audrey Cutting.)

sible for any lien claims and that a contract would be signed by Mr. Smith and that his wages would be paid by Mr. Smith and not by you personally, is that correct? A. That is right.

Q. Did you tell him the property wouldn't be subject to any liens for the wages?

A. No, sir.

Q. Sylvia isn't here now, is she? A. No.

Q. Did you explain to her about the lot?

A. Yes, sir, she knew the property was in her name.

Q. You made a contract to buy 'Thomas' property? A. Yes, sir.

Q. You were having it put in her name?

A. Yes, sir.

Q. To establish an educational fund from the income? [149] A. Yes, sir.

Q. Did she know that you bought it for that purpose? A. Yes, sir.

Q. You never did have any actual interest in that property yourself excepting as representing your daughter?

A. That is right. I made the payments for the lot over. It was a gift for her.

Q. You have no personal interest in the property now? A. No, sir.

Q. Now, Mrs. Cutting, you say at all times that you have been ready to pay \$10,000 in full settlement of the contract and are today? A. Yes, sir.

Q. The only reason you haven't paid is because he wanted more? A. Yes, sir.

(Testimony of Audrey Cutting.)

Q. Isn't it a fact that you told several of these creditors shortly after this work was done that you could get your FHA loan in a short time and would pay the claims just as soon as you got it?

A. Yes.

Q. Didn't you tell practically all?

A. Yes, sir.

Q. The loan never went through?

A. No, I could get the loan. [150]

Q. Aren't you depending on the loan?

A. No, I am not depending on that. There could be other loans arranged.

Q. You stated that you were able at that time to pay this \$10,000 in settlement of Smith's claim?

A. What I meant is that I could get the money.

Q. You could get it right now?

A. Not within five minutes but I could get it before a week was over.

Q. Are you ready now to bring \$10,000 into this Court as full settlement of Russell Smith's claim?

A. I believe I could, to the best of my knowledge.

Q. You would have to arrange a loan for it?

A. Yes, sir.

Q. Did you ever make any attempt to make such a loan?

A. Yes, it was turned down because of the liens.

Q. Anyway, you can't get the FHA loan now, can you?

A. Yes, I can.

Q. You can get the house you can get it?

(Testimony of Audrey Cutting.)

A. It would take about 30 days.

Q. You couldn't get enough to pay Smith right away?

A. No, I couldn't.

Q. That would depend on whether you could get a loan from FHA, wouldn't it?

A. Not necessarily. [151]

Q. You could get it by Monday morning?

A. Yes, sir.

Q. If that money is used in full settlement of Smith's claim, can you have it here Monday morning?

A. Yes, sir.

Mr. Grigsby: If your Honor please, as counsel representing the various claimants, they will accept that provision that \$10,000 be tendered into this Court to be put into the Clerk's hand, subject to the further order of this Court, in full settlement of the claim against Russell Smith.

Q. Mrs. Cutting, would you be willing to do this?

A. If you wish and if my counsel directs me to do so.

Q. This is continued upon whether your counsel directs you to do so? Mrs. Cutting, whether you tendered this depends on whether Mr. Butcher advises you to do so, is that correct?

A. Yes, if he advises me to do so I will. I am willing to pay Mr. Smith just as the contract provides that I do so.

Q. Mr. Smith through his Trustee has sued you on his contract for \$10,500, hasn't he?

(Testimony of Audrey Cutting.)

A. Yes, sir.

Q. Mr. Smith is willing to accept \$10,000 in settlement of what you owe him on that contract.

A. Yes, sir.

Q. You are willing to pay that amount now, providing——?

A. Providing that my counsel advises me to do so, Mr. Grigsby. [152]

Q. Otherwise you won't?

A. That is correct.

Q. This would settle Mr. Smith's claim for that amount but what of the other liens against the property?

A. I had a contract with Mr. Smith and if I pay Mr. Smith I will expect everybody else to release me also. That is why we are in court, Mr. Grigsby.

Q. If you owe \$2,000 personally you want a receipt? A. I don't owe the \$2,000.

Q. Whatever the Court decides you owe in this matter you will pay, otherwise you won't pay?

A. Yes, sir.

Q. You won't settle with Mr. Smith alone for \$10,000?

A. Not unless the other lien holders are taken care of.

Q. What were the dimensions of that tool box, Mrs. Cutting?

A. I didn't measure the box, Mr. Grigsby. The reason I went out there was to post lien notices.

(Testimony of Audrey Cutting.)

Q. I know you didn't measure it but how big was it?

A. It was quite large enough to hold all of the carpenters' tools.

Q. Is it as big as the Clerk's desk?

A. I would say it would be half of that space anyway.

Q. Is it as big as this desk?

A. Generally speaking, yes.

Q. Was there a lid on it? [153] A. Yes.

Q. Where on the box did you put that notice?

A. On the end.

Q. On the end? A. On the side.

Q. On one of the ends? Anyone that went to get tools would necessarily see it?

A. Yes, sir.

Q. You state that the notice got off there some way and you put it back two or three times?

A. I didn't say it "some way." They were all over the yard.

Q. You would pick up these notices around the yard and put them back? A. Yes, sir.

Q. And during how long a period did you continually keep them posted that way?

A. During all the time of the construction until——

Q. Until it was done?

A. Yes, until it was done.

Q. Were they on the lumber pile all that time?

A. No.

(Testimony of Audrey Cutting.)

Q. In the house all that time?

A. The notices were in the house all that time from the time that I posted them there.

Q. That construction was completed about the middle of [154] June. How late would you say a notice was posted in the basement?

A. Well, it was around in the middle part of May.

Q. It was still there in the middle of May?

A. Yes, sir.

Q. Did you ever see it after the middle part of May?

A. Not that particular one. They were all around.

Q. How long did the one on the tool box stay there?

A. I don't know whether it was the same one.

Q. You say that you had the notice on the tool box towards your property where anyone going for his tools would necessarily see it?

A. That is right.

Q. Was it posted there while the box was on your property? A. Yes, sir.

Q. (By Mr. Davis): Mrs. Cutting, you said, I believe, in response to Mr. Grigsby's questions that the box was roughly the size of this smaller table here?

A. Well, in general size, yes, but higher than the table.

Q. How high would you say it was?

(Testimony of Audrey Cutting.)

A. While I didn't, as I told Mr. Grigsby——

Q. You saw it, didn't you? A. Yes.

Q. Was it about as high in front of the table at which you [155] are sitting?

A. No, it was higher.

Q. Was it about as high as the Judge's bench?

A. It was higher than that.

Q. High as the door back there? A. No.

Q. How high was it?

A. Generally speaking it would come up to about here.

Q. Describe the box to us?

A. All I know it is a carpenter's tool box where they put their tools.

Q. There was a door on it, presumably, I suppose, to lock it?

A. I don't know the measurements. I just went to post the liens on it.

Q. You observed the box, didn't you?

A. Not too close.

Q. If you observed the box you should be able to describe the box?

A. Well, I think I have done pretty well.

Q. Was it square? A. No.

Q. Was it oblong?

A. If you mean, was it longer than it was wide, yes.

Q. Was it flat on top? [156]

A. Certain portions of it was flat on top but not all of it.

(Testimony of Audrey Cutting.)

Q. Well, describe it, please?

A. It is just hard to say what that box resembled.

Mr. Butcher: I object to further questioning along that line.

The Court: Overruled.

Q. (By Mr. Davis): It might not be a bad idea to have her draw a picture of it. Are you able to do this, Mrs. Cutting?

A. Well, to the best of my ability. I am not an artist.

Q. But you can give us a rough idea of what that box looks like on paper? A. Yes.

Q. What was it constructed of—wood?

A. Yes.

Q. What kind of wood?

A. I didn't observe the type of wood. All I was interested in was the posting of the liens and I knew there was a lot of wood around there going into the construction of the house. That was as far as I was concerned. I don't know how to start. I can't draw it because of the fact of the angle of the door. Perhaps it resembled a small piano box.

Q. That gives us something to work on. You told Mr. Grigsby that it was to the west side of the lot?

A. Yes. [157]

Q. How far from the excavation?

A. It wasn't too far.

Q. Was there any excavation there at the time you posted these notices? A. Yes.

(Testimony of Audrey Cutting.)

Q. No work was done on the house prior to signing the contract?

A. Not to my knowledge.

Q. There may have been some excavation prior to the contract being signed, couldn't there?

A. Not to my knowledge.

Q. Did you know whether any work was done prior to the 30th of April?

A. I think I made the comment after that that I was quite surprised at the amount of work that had been done there so far.

Q. Do you know of your own knowledge whether any excavation was made on that lot prior to the last of April? A. No, I do not.

Q. Do you know whether any was made on the third day of April? A. No, I do not.

Q. You don't know that when you went out there on the 1st of May that the excavation was made? A. Yes, sir. [158]

Q. Was it completed? A. No.

Q. Was it partially completed?

A. Yes, sir.

Q. Was the shovel there? A. Yes, sir.

Q. Is there any possibility that you might be mistaken about the date you posted these notices?

A. Well, I didn't say an exact statement, no.

Q. I think you have stated that you posted them on the first day of May?

A. That is right, because I took them out directly after they were signed.

(Testimony of Audrey Cutting.)

Q. Could it have been as late as the 10th that you posted these notices? A. No, sir.

Q. As late as the 3rd? A. No, sir.

Q. Positively on the first day?

A. Yes, sir.

Q. Will you describe please the lumber piles on which you posted notices? I believe you stated there were two? A. Yes.

Q. Where were they located, please, Mrs. Cutting?

A. Directly opposite from the tool chest. [159]

Q. Were they near the tool chest?

A. They would be considered near. Anything on the lot would be considered near.

Q. About how many feet, roughly, was it from the tool chest to the lumber pile?

A. Well, I wouldn't say.

Q. You are a real estate agent? A. Yes.

Q. You know the size of a lot in Anchorage?

A. Yes.

Q. If you know a lot was 140 deep you must have some idea of relative distance, about how many feet was the tool chest from the lumber piles?

A. Well, they moved the lumber at various times and moved the tool chest at various times.

Q. I am talking about when you posted the notices?

A. All I will say is that it was close.

Q. And anything on the lot is close in your estimation? A. Yes, sir.

(Testimony of Audrey Cutting.)

Q. Will you tell us what these lumber piles consisted of? A. Lumber.

Q. What kinds? A. All sorts of lumber.

Q. Do you know something about the kind of lumber?

A. Well, shiplap and odds and ends of this and that and what [160] was needed. They were around in two large piles.

Q. The same kind of lumber or different kind?

A. That I wouldn't say.

Q. You don't know? A. I don't know.

Q. How were these notices put up?

A. Just with tacks.

Q. What kind of tacks?

A. It depends on what kind I had with me, like little black tacks.

Q. Did you take a hammer with you?

A. Sometimes.

Q. Do you remember whether you had a hammer with you on the first day of May?

A. Yes, I would say that I had a hammer with me.

Q. Did you then take these notices with you to the lumber piles?

A. Yes, sir, I put them up.

Q. Where on the lumber pile did you put those notices? A. On the end I would say.

Q. Did you tack the notices to one of the boards? A. Yes.

Q. Would you say that it was at the top or middle or down at the bottom?

(Testimony of Audrey Cutting.)

A. It was on the top where everyone could see it. [161]

Q. At various times as that lumber was moved around you state that you would find them and pick them up? A. Yes, sir.

Q. What did these notices contain?

A. Generally speaking they stated that he was the contractor; that he should apply for certain permits, and that he was building the house for me.

Q. Talking about building permits issued by the City did you secure the permits?

A. No, Mr. Smith secured the building permits.

Q. The building permits were posted?

A. I am not sure.

Q. Was the electrical permit in the basement?

A. No, the plumbing permit is there I know,

but——

Q. You saw the plumbing permit?

A. Yes.

Q. You don't remember seeing the building permit posted on the property? A. No.

Q. But you did see some notices stating that Mr. Smith was the contractor? A. Yes.

Q. Were these notices posted prior to the time you posted your notices?

A. Mr. Smith said he was going to post notices and I told [162] him I was going to post mine too.

Q. Which notices were posted prior?

A. I don't recall that he posted his notices first, but it seems to me that he was going to post them.

(Testimony of Audrey Cutting.)

Q. Do you know where that tool chest came from? A. No, I don't.

Q. Did it come from Major Seifert's property?

A. No.

Q. Isn't it possible that tool chest wasn't located on your property but was on Major Seifert's?

A. That could be. There was no fence. You can never be sure of a boundary here.

Q. It might have been on his property rather than yours? A. I wouldn't say yes or no.

Q. How about the lumber, is the same thing true as to that?

A. Personally, I think some of the lumber, as I have said, that some of my lumber went into Major Seifert's property.

Q. Was it on Seifert's property or on yours?

A. But it was my lumber.

Q. Please answer my question. I will admit it was your lumber, but was that lumber on Seifert's property or could it have been on yours?

A. It could have been.

Mr. Butcher: Objection.

Mr. Davis: That is all. [163]

Further Redirect Examination

By Mr. Butcher:

Q. Mrs. Cutting, I want to ask you in so far as these notices are concerned, when you went out there to the lot was there any specific object placed there? A. No, there wasn't.

(Testimony of Audrey Cutting.)

Q. You posted the notices on what you found?

A. Yes, sir.

Q. And the notice posted in the basement, I believe you testified, you posted at a later date and that you posted this in the basement?

A. Yes, sir.

Q. Could the notice on the lumber pile have been seen by anyone who picked up a piece of lumber?

A. Yes, sir.

Q. Could the notice on the tool box been seen by anyone who went to the tool box?

A. Yes.

Q. Was there an outhouse put on the lot for the use of the men?

A. I don't remember an outhouse.

Q. You don't remember that?

A. No, sir.

Q. How well do you recall the day you posted the notices; do you absolutely know those notices were posted on the first day [164] of May?

A. I posted them that day immediately after they were typed.

Q. Is your recollection sufficiently good enough at this time to know offhand if it weren't on the date shown on the notice?

A. I don't remember, it could have been the third day of May.

Q. This is from your recollection?

A. Yes, from my recollection.

Q. As to the location of this box, do you know where the excavation was?

A. Yes.

Q. Was that box directly east of the excavation or was it to one side?

(Testimony of Audrey Cutting.)

A. Well, it wasn't east.

Q. The front of the lot was facing west?

A. The back faces west.

Q. The front of the lot faces east?

A. Yes, sir.

Q. Would this box be directly west of the excavation?

A. Yes, sir.

Q. Would it have been way over to one side?

A. Yes, sir, it was to one side.

Q. Did the house have a back door?

A. Yes, evidently.

Q. Was the back door in the middle?

A. No, on the side. [165]

Q. Was the building in the middle of a lot?

A. No.

Q. Was the house sitting more to one side than the other and more toward the Seifert property?

A. Yes, sir.

Q. If you were to stand directly in the center of the house looking west would that box have been to the right or to your left?

A. Looking from the house towards the alley it would be to the left.

Q. Several feet to the left?

A. It would be several feet.

Q. Would it be to the lot line, as you know it?

A. Yes, it would as they have put up a fence.

It was on my side of the fence.

Q. That is your best recollection now?

A. Yes, sir.

(Testimony of Audrey Cutting.)

Mr. Grigsby: Objection as to being a leading question.

The Court: Objection sustained.

Q. (By Mr. Butcher): About the location of the lumber piles, I think you stated in answer to Mr. Davis' question the lumber was on the other side. Tell us from your own recollection where you think those lumber piles were?

A. I presume they were on my own lot. [166]

Q. Think about it and tell us if it was over the line or on your side of the line?

A. I wouldn't be sure.

Q. Do you know where the fence is located now?

A. Yes, sir.

Q. In relation to the rear of the house and that fence, do you recall where the lumber was?

A. Why, I would say that it was on my side of the lot after the fence was put up, from the general dimensions of it, yes.

Q. Looking west, which side would the lumber be on, the same side as the box or the opposite side?

A. You are speaking of the time the notices were posted?

Q. Yes.

A. Well, the box and the lumber, as I told Mr. Grigsby, were within a short distance of one another.

Q. There were two piles of lumber?

A. Yes, sir.

(Testimony of Audrey Cutting.)

Q. Were they on the opposite sides of the lot?

A. No, all of them at the left-hand side of the house looking out to the east.

Q. Were they closer to the middle of your lot to the box?

A. Well, they were a short distance from the box. They were all in the general same locality.

Q. And on your property?

A. Well, it was evidently my property.

Q. That is your best recollection? [167]

A. Yes, sir.

Q. You didn't take a tape measure and measure it? A. No, sir.

Q. You posted notices in the basement as soon as the post was up? A. Yes, sir.

Q. Is that post buried in the floor?

A. I wouldn't be for sure. It is to hold up the floor of the main floor.

Q. The copy you have identified as being on that post is the copy you saw from time to time on the post or around on the floor? A. Yes.

Q. I believe you stated in answer to Mr. Davis' questions——

Mr. Davis: I don't believe he has any right to relate what she told me.

The Court: Objection sustained.

Q. (By Mr. Butcher): Did you say in answer to Mr. Davis' question that you picked them up several times—the notices up several times?

A. Yes, sir.

(Testimony of Audrey Cutting.)

Q. How many times did you pick them up?

A. Too many times to remember just how many times. Mr. Davis inquired into excavation work.

Q. When did the excavation work first come to your attention? [168]

A. When I went out to post the notices the first time.

Q. You knew then that the work was actually going on? A. Yes, sir.

Q. That, to your best recollection, is the first time you noticed the excavation?

A. Yes, sir.

Further Recross-Examination

By Mr. Kay:

Q. Mrs. Cutting, you heard Mr. Anderson testify as to that bill for your lumber?

A. Yes, sir.

Q. And you heard Mr. Anderson testify that he sent you a bill on or about June 1st?

A. Yes, sir.

Q. You did not receive any such bill?

A. No, sir.

Q. You never received this bill?

A. No, sir.

Q. Isn't it a fact that shortly after June 1st he asked you for that bill? A. No, sir.

Q. You deny that you ever received a bill from the Ketchikan Spruce for lumber?

A. To my best recollection I did not receive any.

(Testimony of Audrey Cutting.)

Q. Did you make any agreement to pay for your lumber on or [169] before the 10th of each month?

A. No, I never made any agreement with Mr. Anderson.

Q. Mr. Anderson wasn't telling the truth?

A. I would say that.

Q. You are, though? A. Yes, sir.

Q. You state May 1st is the date you posted these notices, is that correct? A. Yes, sir.

Q. You state you dictated them to your stenographer; how could you prepare them?

A. Well, I had a form that I used.

Q. Where did you get your form?

A. I don't recollect. It was written for another job and so I took it along.

Q. What other job was it used on?

A. I don't know that either. I found it in a gutter.

Q. You state you found it in the street?

A. Yes, sir.

Q. You were walking around and picked it up?

A. Yes.

Q. Was that on May 1st that you found that form or sometime previous?

A. Sometime previous.

Q. You got that form out and made a copy of it? [170]

A. I had my secretary make a copy of it.

Q. You just handed that form to her and asked her to prepare a copy? Did that copy have your name on it? A. No, sir.

(Testimony of Audrey Cutting.)

Q. You made some changes on it, then?

A. Yes, sir.

Q. About what time of day was this?

A. I left orders for her to type it and she did in the afternoon.

Q. When did you leave the orders?

A. In the morning.

Q. She typed it sometime during the afternoon?

A. I presume so.

Q. Was that on May 1st, do you recall, Mrs. Cutting?

A. No, I don't. It was on a Saturday.

Q. Does your stenographer work until five o'clock on Saturday? A. Yes, sir.

Q. Is that Mrs. Sollee? A. Yes.

Q. Where did you sign the notice?

A. In my home.

Q. Where did Sylvia sign these?

A. In my home.

Q. You had a discussion and explained them to Sylvia? A. Yes, sir. [171]

Mr. Butcher: Objection.

The Court: Overruled.

Q. (By Mr. Kay): About what time did you decide to drive out to the property?

A. I don't remember, it was during the evening.

Q. Before 10 o'clock?

A. I wouldn't say so, no. It might have been.

Q. After? A. It might have been.

Q. Did anyone go with you?

(Testimony of Audrey Cutting.)

A. Sylvia went along with me.

Q. I thought you testified you went out there alone?

A. She stayed in the car.

Q. Do you recall now how you signed this in your home and where you were at the time you signed it?

A. I believe I was in the front room.

Q. Where in the front room?

A. On the coffee table in the front room.

Q. Did you sign it first or did Sylvia?

A. I signed it first and then handed it to Sylvia.

Q. Were all four copies signed at the same time?

A. Yes, sir.

Q. Then you took the four copies and you and Sylvia rode out to the property?

A. Yes, to the best of my recollection. [172]

Q. Did you take the tack hammer with you?

A. Yes, sir.

Q. Did you take a box of tacks?

A. Yes, sir.

Q. This was on the evening of May 1st before or after ten o'clock?

A. Yes, sir.

Q. You went up there and found the tool box?

A. Yes.

Q. Was it dark or light out there?

A. We have considerable daylight at that time.

Q. At this time when you were out there was it dark or light?

A. It wasn't dark.

Q. You didn't need a flash?

A. No, sir.

Q. So you tacked it up on the box, is that right?

(Testimony of Audrey Cutting.)

A. Yes, sir.

Q. All four notices that evening?

A. No, only three.

Q. Did you tack up the carbon copies or the originals? A. I couldn't say for sure.

Q. Didn't you testify that you had the original?

A. Yes, sir.

Q. So you tacked up the carbon copies, then, didn't you? A. I didn't say. [173]

Q. And you kept the original, isn't that right?

A. No.

Q. Did you tack up the original or carbon copies? A. I wouldn't say.

Q. You testified that the first time you were out there you were surprised at the amount of work which had been done, what occasioned that surprise?

A. I didn't expect Mr. Smith to get started for more than a week.

Q. How much was done?

A. Part of the excavation.

Q. That surprised you? A. Yes.

Q. That was all that was done? A. Yes.

Q. You are certain that these lumber piles were out there at this time? A. Yes, sir.

Q. You refer to this lumber in answer to Mr. Davis as your lumber?

A. Well, it was lumber for my house.

Q. You had a contract with Mr. Smith?

A. Yes, sir.

Q. You were looking to Mr. Smith for the con-

(Testimony of Audrey Cutting.)

struction? A. Yes, sir. [174]

Q. What was your concern about that lumber, you didn't expect to pay for it, did you?

A. No.

Q. Who was being charged for it?

A. As far as I know Mr. Smith.

Q. What was your concern?

A. I was concerned about this lumber getting into Major Seifert's house.

Q. Didn't you have a firm contract with Mr. Smith? A. Yes.

Q. You looked to him to pay for the lumber, didn't you? A. Yes.

Q. Isn't it a fact that you were concerned about this lumber because you had been billed for the lumber by the Ketchikan Spruce Mills?

A. No, sir.

Q. Mrs. Cutting, you made an earnest search for the contract? Will you tell us where you searched?

A. I have searched all of my office papers and where I usually leave my papers and I am unable to find the contract at this time.

Q. Did you inquire of the Union Bank?

A. Yes, sir.

Q. What day?

A. At the time I was looking for the papers.

Q. That was yesterday?

A. Day before yesterday.

Q. With whom did you talk?

A. Mrs. Crawford.

(Testimony of Audrey Cutting.)

Q. Did you inquire at the offices of McCutcheon and Nesbett? A. Yes.

Q. Who did you talk to there?

A. Mrs. Brooks.

Q. What time of day was that?

A. It was between the Court recess between twelve and two.

Q. Between twelve and two?

A. Yes, yesterday.

Q. Did you inquire as to the whereabouts of Mr. Ralph Thomas to see whether he has a copy of it?

A. I found that the C.A.A. knows — had no knowledge of his whereabouts.

Q. The last you were informed Mr. Thomas was a C.A.A. employee?

A. He was, the last I heard from him.

Q. I believe there was some testimony as to who were the parties to the original contract, who were these parties?

A. Between myself and Mr. Smith.

Q. Yourself and Mr. Thomas?

A. The original parties? I was not sure whether I had signed the contract or my daughter had signed the contract.

Q. Who were the parties to the purchase of the property? [176]

A. Mr. Thomas and my daughter.

Q. You were not a party to that?

A. I wouldn't be sure.

(Testimony of Audrey Cutting.)

Q. You are not certain as to whether you were a party to that contract?

A. No, I wouldn't be certain until I found the contract itself.

Q. You are certain that Sylvia Henderson is a party to that contract?

A. I wouldn't say that she was or wasn't.

Q. Is the deed to Sylvia Henderson?

A. Yes, sir.

Q. Was any deed ever prepared from Ralph Thomas to you?

A. Yes, sir.

Q. Certain?

A. Yes, sir.

Q. Positive?

A. Yes, sir.

Further Redirect Examination

By Mr. Butcher:

Q. You have made a diligent search for this contract?

A. Yes, sir.

Q. Do you recall when you made the first search of this contract?

A. It was the first day of the trial. [177]

Q. Did you make any further search?

A. Yes, sir, in fact I have searched both days.

Q. Do you recall whether you made a search yesterday?

A. The first day I searched all my papers at home. Yesterday I looked in the office.

Q. Did you have any conversation with me over the 'phone?

A. Yes, sir.

(Testimony of Audrey Cutting.)

Q. Did you ask me if I had any suggestions where you might search? A. Yes, sir.

Q. Where did I tell you to search?

A. You told me to search in the office and to see if they had a copy in the office of McCutcheon and Nesbett and search my files and I said that I had done that and they hadn't a copy in their files.

Q. When did you talk to Mrs. Brooks and ask her, could it have been yesterday noon?

A. Yes, sir—I am not sure whether it was the day before that or yesterday that I called McCutcheon and Nesbett's office.

Q. Is this lien form which you say you picked up out of the gutter, is that the only one you have ever seen? A. Yes, sir.

Q. You came by that inadvertently as you have testified? A. Yes, sir.

Q. You state you were concerned about the Seifert residence [178] and the material belonging to you, do you recall what period of construction this was on both houses?

A. I would say they were getting along a ways on my house before they started on the Seifert house. It was at that time that some of the employees of my job were going over to the Seifert job.

Q. Did you ever talk to Mr. Smith about the Ketchikan Spruce Mills' account?

A. Yes, I did.

Q. With reference to the bill for materials?

(Testimony of Audrey Cutting.)

A. Yes.

Q. Now, will you tell us how your mail is normally handled? You have a post office box?

A. Yes.

Q. Who has the key?

A. Myself and my secretary.

Q. Do you both pick up mail there?

A. Yes, sir.

Q. Could it have been posted and somehow you never received it?

A. That has happened.

Q. That has happened previously?

A. Yes, sir.

Q. You couldn't recall ever seeing a bill from Ketchikan [179] Spruce Mills?

A. No, sir.

Q. That is, around June 1st?

A. No, sir.

Q. You did get a bill later? A. Yes, sir.

Q. You think that if Mr. Lyle Anderson says otherwise he is mistaken?

A. I think Mr. Anderson is taking the usual precautions.

Further Recross-Examination

By Mr. McCarrey:

Q. Calling your attention to direct examination of Mr. Butcher yesterday with reference to the Alaska Sand and Gravel and the supplies and materials furnished by that company, I believe you stated that Mr. Waldron came to your office, is that correct? A. Yes, sir.

(Testimony of Audrey Cutting.)

Q. I believe that you stated Mr. Waldron made a confirmation of the contract between you and Mr. Smith? A. Yes, sir.

Q. Had any material been taken out to your job prior to Mr. Waldron's coming to your office?

A. That I wouldn't know.

Q. Isn't it a fact that Mr. Waldron stated that he could not give any credit to Mr. Smith?

A. Not those exact words. Mr. Waldron wanted to know just [180] what form of an agreement I had with Mr. Smith. He told me that he personally would not give credit to Mr. Smith but if he had a sound contract he would back Mr. Smith.

Q. He told you that he wouldn't give Smith personally any credit? A. That is right.

Q. What led you to believe that Mr. Waldron would give Mr. Smith credit if he had a contract?

A. I told him the exact terms and told him that Mr. Smith was not to be paid one cent until it was finished.

Q. What did he say?

A. He didn't doubt my ability to pay the contract when it was finished.

Q. Then Waldron did not give credit to Mr. Smith?

A. He evidently did because the material was there?

Q. He went along with the contract?

A. It was perfectly agreeable that the contract was okeh.

(Testimony of Audrey Cutting.)

Q. Did he not state that he would give you credit but not him?

A. No, he didn't say he was giving me any credit. I told him exactly what the contract included and Mr. Waldron made the comment to wait for his investment in it.

Q. When you say "he" whom do you mean?

A. I mean that Mr. Waldron would be satisfied.

Q. Did he say that? [181]

A. He gave me that impression.

Q. Did he say that?

A. He said that the contract was substantial and that it was a good contract.

Q. When you have reference to a good contract what do you mean?

A. I mean it was well drawn and that the job was okeh.

Q. He did give you credit?

A. No, he gave it to Mr. Smith.

Q. He refused to give it to Mr. Smith?

A. No. Waldron did give Mr. Smith credit provided it was a good, sound contract and the ability of the people with whom he had the contract to pay.

Q. He would not give Smith credit if Smith were doing the contract alone?

A. He would not. He said that he would not give Mr. Smith one cent of credit but as long as he were building the house for me he would.

Q. In other words he looked to you for the \$9800?

(Testimony of Audrey Cutting.)

A. He looked to me for the \$9,800 to satisfy all material claims for the completion of that house.

Q. You understand, that at that time Mr. Waldron didn't have \$9,800 coming?

A. No, Mr. Smith did. I made many statements to Mr. Waldron that he wasn't to expect pay until the entire construction was [182] completed and that his pay was to come out of the \$9,800 which I would pay Mr. Smith at the time the house was completed.

Q. Referring to the contract which you had with Mr. Smith, I believe that you stated that your name was on there and Mr. Smith's only. Your daughter doesn't appear?

A. My name appears there with Mr. Smith's.

Q. Reading from a copy of the contract "This agreement was made this 30th day of April by and between Russell W. Smith, an independent contractor, hereinafter called the "contractor" and Audrey Cutting of Anchorage, Alaska, hereinafter called the "owner." Was it your intent to hold yourself out as the owner when the house was completed?

A. No, it appears only as guardian.

Q. Then why did you state in the contract that you were owner?

A. My daughter wouldn't be of age to sign the contract but I would.

Q. Were all four copies of the claim notices signed? A. Yes.

(Testimony of Audrey Cutting.)

Q. By yourself and Sylvia Henderson?

A. Yes.

Q. I hand you a copy of the Anchorage News published last night and call your attention to the notice in which you state you are selling the whole of lot 2, block 37-D, in the South Addition in the near future. Did you cause that notice to be [183] published?

Mr. Butcher: Objection.

The Court: Overruled.

Q. (By Mr. McCarrey): Is this the same property as is being litigated before the Court?

Mr. Butcher: Your Honor, the property is not being litigated.

Mr. McCarrey: I consider this very material, Your Honor, of material value as there are elements concerned. Furthermore the witness is guardian of Sylvia Henderson and I would like to inquire into the matter.

Mr. Butcher: I think this has nothing to do with the case.

Q. (By Mr. McCarrey): Is this notice the same lot on which the house that we have before the Court at issue is—that we have at issue before the Court? A. Yes, it is.

Q. Are you the guardian of Sylvia Henderson?

A. Yes, sir.

Q. When were you so appointed guardian?

A. Just recently.

Q. January or February of this year?

(Testimony of Audrey Cutting.)

A. I wouldn't be too positive as to the exact date.

Q. You would have to check? [184]

A. Yes.

Q. Was it in December that you instituted proceedings to become guardian? A. Yes, sir.

Q. Sometime subsequent then and in this year you were appointed guardian? A. Yes, sir.

Q. For what purpose did you seek to be appointed guardian of Sylvia Henderson?

A. For the sale of lot 1 in block 26-A of the South Addition, and the possibility of eventually or maybe selling the home on lot 2 in block 37-D of the South Addition.

Q. In what Court were you appointed guardian of Sylvia Henderson?

A. I was under the impression it was under the Court in Nome but I was mistaken so it was recently in the present Court I was appointed at Anchorage.

Q. Have you ever heretofore been appointed guardian?

A. I was given custody of her in Nome. I was under the impression at that time that that would also rule all guardianship matters.

Q. Then you never have been guardian before?

A. No, sir.

(Testimony of Audrey Cutting.)

Further Redirect Examination

By Mr. Butcher: [185]

Q. When you state that you have recently been appointed guardian have you received an order stating that you were appointed?

A. I don't believe the guardianship is completely finished.

Q. Tell the Court about the present effort being made for guardianship?

A. The guardianship was applied for because of my misinformation and the sale of the home and lot 1 in block 26-A and to take care of expenses involved in raising Sylvia.

Q. Who is handling it for you?

A. Mr. Peterson.

Q. Has Mr. Peterson ever advised you that you were now the guardian? A. No.

Q. You do not know whether you are actually the guardian of Sylvia but you do know that the proceedings are in effect to make you the guardian?

A. Yes.

Q. Now in reference to the contract to which you testified that Mr. McCarrey drew, had you discussed with Mr. McCarrey the relation you had to Sylvia and who the owner of the lot was at that time?

A. No. McCarrey knew my daughter and knew that Sylvia was awarded to me in the Court but as to the exact ownership of the property he didn't say he knew about that. [186]

(Testimony of Audrey Cutting.)

Q. He didn't know whether Sylvia was the purchaser or you were?

A. No, I don't believe he did. I did tell him I was building the house for my daughter. He knew that.

Q. Did you tell him that she was a minor?

A. No. Mr. McCarrey knows that my daughter is a minor.

Further Recross-Examination

By Mr. Grigsby:

Q. Mrs. Cutting, you state that you inquired of Thomas as to the contract for the purchase of this property? A. Yes, sir.

Q. Where did you see him?

A. I didn't see him.

Q. Where did you inquire of him?

A. At his last address. I have on my files.

Q. You state that you don't know his whereabouts? A. Yes.

Q. You don't know where he is now?

A. No, sir.

Q. You don't know where he is now at all?

A. No.

Q. Do you know where he lived? A. No.

Q. Do you know where he was reached at the time you were dealing with him? [187]

A. C.A.A. quarters.

Q. Do you know where he lived after that?

A. No, sir.

(Testimony of Audrey Cutting.)

Q. That deed to Sylvia Henderson is dated the 30th day of November, 1946? A. Yes, sir.

Q. Who drew it for you?

A. McCutcheon.

Q. At the same time was the contract drawn?

A. Yes.

Q. Who drew it? A. Mr. McCutcheon.

Q. Not Mr. Nesbett?

A. I wouldn't say for sure.

Q. Did you, since this trial started, ask Mr. Nesbett where that contract was?

A. I believe I called the attention of this matter to Mrs. Brooks.

Q. You don't know whether she worked there at the time the contract was drawn?

A. No, she didn't work there.

Mr. Grigsby: That is all the inquiry you have made?

The Witness: I thought that was all that was necessary. That is all of the inquiry I had made but if you wish me to ask, Mr. Grigsby, I will. [188]

Q. (By Mr. McCarrey): Mrs. Cutting, I believe you testified that the contract between you and Mr. Smith was drawn up in our office, is that correct? A. Yes, sir.

Q. Did you ask to have that contract drawn up?

A. No, I don't believe so.

Q. Isn't it a fact that Mr. Smith asked to have that contract drawn? A. Yes, sir.

Q. You have never paid for that contract?

(Testimony of Audrey Cutting.)

A. I thought I sent you a check for it, but if I haven't I am glad you called my attention to it.

The Court: As I understand it, the lot in question is on the west side of H Street?

A. It is on the right-hand side.

The Court: And the Seifert lot is south or north of this lot?

The Witness: Right next door.

The Court: That would be the southerly direction?

The Witness: Yes.

(Noon recess.) [189]

Afternoon Session

The Court: Mr. Butcher has reported that he is indisposed and will not be able to go on with the trial this afternoon. This case will be continued until 10 o'clock, a.m., Monday morning, February 14th. I would like to hear the law argued while the facts are still fresh in my mind.

(Whereupon, at 2:05 p.m., Thursday, February 10, 1949, the trial was continued until 10 o'clock, a.m., Monday, February 14th, 1949.)

United States of America,
Territory of Alaska—ss:

I, Catherine Parsons, certify that I performed as acting official court reporter pursuant to stipulation of counsel in the taking of testimony in the above-named case, held the 8th, 9th and 10th days

of February, 1949, and that my notes were dictated and transcribed under my direction.

/s/ CATHERINE PARSONS.

Dated at Anchorage, Alaska this 22nd day of July, 1948. [191]

Monday, February 14, 1949

The Court: The trial of causes No. 5087 and No. 5088 will now be resumed. We suspended on Thursday. The defendant, Audrey Cutting was on the witness stand. Mrs. Cutting may resume the witness stand for further examination.

AUDREY CUTTING

called as a witness herein, being previously duly sworn, resumed the stand and testified as follows:

Direct Examination

Mr. Butcher: Your Honor, what was the status of the examination? I have forgotten. I believe Mr. McCarrey was examining.

The Court, I believe plaintiff had finished.

Mr. McCarrey: I have finished, Your Honor.

Mr. Butcher: I wonder if I could have the stenographer read the last question or last couple of questions?

The Court: No, sir, because the stenographer isn't here. We have a new reporter this morning. If I had known counsel would ask for it I would have had the other reporter here.

(Testimony of Audrey Cutting.)

Mr. Butcher: Perhaps Mr. McCarrey remembers the subject.

The Court: Mrs. Cutting testified that at first Waldron said he would not give Smith credit but after some discussion between Mrs. Cutting and Waldron, according to her testimony, Waldron was satisfied with the contract between Mrs. Cutting and Waldron and he agreed to "go along" and Mrs. Cutting also testified that she was recently appointed the guardian of Sylvia [4] Henderson. Mr. Butcher, counsel for defendant asked some further question about the appointment of a guardian and as I recall that is where we finished.

Mr. McCarrey: That is what I remember, Your Honor.

Mr. Butcher: I believe, then, that I was endeavoring to determine whether Mrs. Cutting was actually guardian or whether there was just proceeding in process.

The Court: And she was uncertain. She said there were proceedings in court but she doesn't know the precise state of the proceedings. I suppose if that is of any consequence the files can be brought in or some other proof will be given to show just what the status of the guardianship proceedings are at this time.

Q. (By Mr. Butcher): Then I will ask, Mrs. Cutting, during any of the times mentioned in the various complaints and during the construction of this home and the filing of the liens, were you the guardian of Sylvia Henderson?

(Testimony of Audrey Cutting.)

A. I hadn't been appointed by the Court, no.

Q. When did he commence the present proceedings?
A. In December.

Q. In December of 19——?
A. 1948.

Q. And you, I believe, testified that Mr. Peterson represented you? [5]
A. Yes, sir.

Q. Had you ever in any other Court at any time been appointed guardian for Sylvia Henderson?

A. I was under the impression I was her guardian but I hadn't actually been appointed.

The Court: I beg your pardon?

The Witness: I was under the impression due to it but I had not been appointed officially by the Court.

Q. (By Mr. Butcher): Had any papers been processed in Nome making you guardian?

A. Nothing else but the divorce decree.

Q. Nothing but the divorce decree?

A. Yes, sir.

Q. That is the divorce decree between whom?

A. Between Sylvia's father and myself.

Q. That is Mr. Henderson?

A. Mr. Henderson.

Q. And that divorce decree did that give you custody of Sylvia?

A. Gave me full custody, yes, sir.

Q. Did it give you anything besides custody; did it give you any money?

A. She was allowed \$50.00 per month for her support.

(Testimony of Audrey Cutting.)

Q. When was that decree handed down, do you recall? A. April 16th, 1944.

Q. April 16th, 1944. And was the \$50.00 a month paid? [6] A. Yes, sir.

Mr. Grigsby: What is the materiality of that. We object to it.

The Court: Objection sustained.

Mr. Butcher: Your Honor, may I be heard on the point. I have a reason for it.

The Court: I wish the counsel would ask to be heard before the Court rules. Counsel may be heard nevertheless.

Mr. Butcher: Your Honor, if it appears that Mrs. Cutting over a period of years had received substantial sums of money which she has saved and invested on behalf of her child, Sylvia Henderson, in properties and it so happens that this property which we have under consideration here is one of the properties and that property is a subject of foreclosure proceedings, then it is of interest to the Court, particularly under the law involved, to know whose money actually went into the purchase of the property.

The Court: Very well, Counsel,——

Mr. Grigsby: May I be heard now?

The Court: Yes, surely.

Mr. Grigsby: Now it has been testified that she got \$50.00 a month for the support of the child and presumably if that was paid she did get it for the support. Now if she used her own money to sup-

(Testimony of Audrey Cutting.)

port the child and used that identical money and not the money she got to invest in some fund it might be material [7] that that money is for the support and it is to be applied that way and not to a fund to purchase property with.

The Court: I think the argument of the counsel goes to the weight of the evidence and not the admissibility. If it were shown that the former husband of Mrs. Cutting had left her a million dollars, we will say, Sylvia A. Henderson, a large sum of money, why it might be material and even though the sum is small it may possibly be material, therefore the objection is overruled and the witness may answer. Counsel may restate the question if the witness has forgotten it.

Q. (By Mr. Butcher): You received a sum, I believe you said, of \$50.00 per month?

A. Yes, sir.

Q. Do you remember when that sum was first paid to you, the first month?

A. The first \$50.00 was paid in May, 1944.

Q. Paid in May of 1944 and has it been paid continuously ever since? A. Yes.

Q. Have you any idea as to this date as to how much money has been paid in?

A. Roughly around approximately \$3,000.00.

Q. And what has been your disposition of this money?

A. Well, the disposition, I have allotted it—well,

(Testimony of Audrey Cutting.)

part of it to her support and part of it to various properties and [8] investing it for her for her future.

Q. Did any of that money go into the purchase of lot No. 2 of block 37-D, to your knowledge?

A. Well, yes, I would say it did. Yes.

Q. How did you handle that money, Mrs. Cutting?

A. Well, it was deposited to my trust account here and paid out of the trust account.

The Court: I wonder if counsel will pull the table back a bit so that he doesn't shut off my view of the other counsel.

Q. (By Mr. Butcher): I believe you testified that under the subject of the acquisition of the property—lot D or lot 2—that you paid the sum of \$50.00 per month? A. And interest.

Q. Did you allot the \$50.00 a month you received from your former husband for that purpose? A. Yes, I did.

Q. So that actually the money that this lot was purchased with was money coming from Sylvia's father, Mr. Henderson? A. Yes, sir.

Mr. Kay: I object, Your Honor, to these leading questions.

The Court: Objection is sustained. Counsel has testified, not the witness.

Q. (By Mr. Butcher): You may testify then whether any moneys received from Mr. [9] Henderson went into this present lot?

(Testimony of Audrey Cutting.)

A. Practically all of the money that he sent has went into that lot.

The Court: Did you keep a separate account of this money, Mrs. Cutting? Did you put it in a separate fund in the bank so that it could be distinguished from your money or was this just a mental process of yours?

The Witness: No, it was put in the trust fund that I had in the bank; it was put in my name as a trustee.

The Court: Did this trust fund contain any other funds than that money paid for the support of Sylvia Henderson?

The Witness: That is correct. There were other funds.

The Court: All of the funds which you did business with were put in that fund, weren't they?

The Witness: Yes, sir.

The Court: Counsel can proceed with the examination but it seems to me to be fruitless.

Q. (By Mr. Butcher): Mrs. Cutting, did you keep any kind of record of the various funds in that account? A. Yes, I did.

Q. And the purpose for which they were deposited?

A. Yes, sir, I have to keep a record.

Q. Did you keep a record of any moneys received on behalf of Sylvia and deposited in that fund? [10]

A. Yes, sir.

(Testimony of Audrey Cutting.)

Q. And you did this all during the time you have been receiving the \$50.00 a month?

A. Yes, sir.

The Court: Tell me more about this trust fund, what goes into it and what doesn't go into it?

The Witness: All moneys that are taken in as deposits on the various real estate deals I have—any of the moneys that I have to account to that I handle for other people and my daughter is one of them.

The Court: Did you have any other account in the bank?

The Witness: Yes, she has had various accounts in the bank—a savings account in the Union Bank.

The Court: What about yourself, did you have any other account in the bank other than the trust fund account?

The Witness: I did at one time but I don't any more.

The Court: When was that other account closed out?

The Witness: It was closed out last spring.

The Court: Spring of 1948?

The Witness: Yes, sir.

Q. (By Mr. Butcher): Now, Mrs. Cutting, you were not certain previously when you testified as to the manner of the acquisition of this property and you informed counsel and the Court that you would endeavor to make a search for the papers which were executed in connection [11] with the

(Testimony of Audrey Cutting.)

case other than the deed. Were you successful in finding any papers? A. Yes, I was.

Q. What did you find?

A. I found the note that you executed for \$1500.00 and I found the copy of the mortgage.

Q. Copy of a mortgage? Did the finding of the copy of that mortgage refresh your memory as to what actually happened in connection with the purchase of that lot and, if so, what?

A. Well, finding the copy of the mortgage made me realize that it wasn't a real estate contract so therefore it should be a note, so I went through all my papers again and found the income tax receipts.

Q. Have you been to the bank to find out if they had a copy of the original mortgage?

A. Yes, sir.

Q. And I believe you testified previously you called the firm of McCutcheon and Nesbett and asked them? A. Yes, sir.

Q. You searched among your own papers?

A. Yes, sir.

Q. I hand you this paper and ask you to tell me what it is if you know?

A. It is a copy of a mortgage.

Q. A copy of the mortgage between whom? [12]

A. Between Sylvia A. Henderson and Ralph R. Thomas.

Q. And do you know what that mortgage was given for?

(Testimony of Audrey Cutting.)

A. It was a mortgage on lot 2, block 37D of the south addition.

Q. Given by Sylvia Henderson?

A. Yes, sir.

Q. To Ralph Thomas?

A. To Ralph Thomas.

Q. Sylvia Henderson was the mortgagor, was she?

A. Yes, sir.

Q. Mr. Thomas was the mortgagee?

A. Yes, sir.

Q. May I have the deed in connection with this case? You will recall that you previously identified this deed as the deed which invested the property in your daughter, Sylvia Henderson?

A. Yes, sir.

Q. Now was this mortgage executed after the deed was signed and delivered?

A. Well, as I recall they were executed both at the same time.

Q. What do you recall about the transaction and circumstances, if you can? Where did it occur and what was the circumstances surrounding the signing of these papers and the issuance of the mortgage, if you remember?

A. Well, the deed was signed first and then the mortgage.

Q. The deed was signed by Mr. Thomas? [13]

A. Yes, sir.

Q. And do you recall where it was signed?

A. It was signed in the law office of McCutcheon and Nesbett.

(Testimony of Audrey Cutting.)

Q. And then this mortgage was prepared?

A. Yes, sir.

Q. Who prepared the mortgage, if you recall?

A. Both Mr. McCutcheon and Nesbett.

Q. Was there a stenographer present?

A. Yes, sir.

Q. Who was the stenographer?

A. Mary Jane Squyres.

Q. Did she type the mortgage?

A. Yes, sir.

Mr. Butcher: Your Honor, I desire at this time to introduce this copy of the mortgage. As Mrs. Cutting testified, she made a search for the original mortgage and it is not to be found but we have a true copy of it which has notations on it and also other evidence which indicates that it is a true copy of the mortgage. We also have the mortgage note which I will introduce later.

The Court: The original mortgage is at the bank still?

Q. (By Mr. Butcher): Mrs. Cutting, did you inquire at the bank for the mortgage?

A. Yes, I did and I found that it wasn't there. In fact the only bank records indicate that it was a mortgage—that it has [14] written across the page Mortgage Not Recorded.

Q. At the bank? A. Yes, sir.

Q. On the bank records? A. Yes, sir.

Q. Who has custody of these records?

A. Mr. Hassman.

(Testimony of Audrey Cutting.)

Q. Is Mr. Hassman in town—in Anchorage?

A. To my last recollection when I was there Saturday he was still in Palmer.

Q. Who has custody of the records in his absence? A. I believe Miss Crawford.

Mr. Butcher: Your Honor, while counsel is examining the mortgage, may I request the court to authorize the issuance of a subpoena duces tecum to the Union Bank to produce such records as they may have in connection with this case?

The Court: Any authorization that is necessary is given now. Is there objection?

Mr. Grigsby: You don't know where the original of this is?

The Witness: No, sir.

Mr. Grigsby: May I see the deed? Was this mortgage and deed executed on the same day?

The Witness: Yes, sir.

Mr. Grigsby: Was this mortgage signed by Sylvia Henderson?

The Witness: Well, it was made out to her so evidently she must have signed it. [15]

The Court: What is that?

The Witness: The mortgage was made out to Sylvia Henderson.

Mr. Grigsby: The mortgage is made out to Mr. Thomas and was signed and purports to be executed by and between Sylvia Henderson and Ralph R. Thomas. You had this done, didn't you?

The Witness: Yes, sir.

(Testimony of Audrey Cutting.)

Mr. Grigsby: Was it signed by Sylvia Henderson?

The Witness: It was signed by Sylvia Henderson.

Mr. Grigsby: Not by yourself as her guardian?

The Witness: No, sir.

Mr. Grigsby: Now, then, you didn't have any contract of purchase with Thomas?

The Witness: No, sir. I believe I specified that I wasn't sure whether it was a contract or a mortgage.

Mr. Grigsby: Please answer the question? I don't believe you are testifying to any such thing. But you know now that there wasn't any contract?

The Witness: That is right.

Mr. Grigsby: Now did you get possession of the property right away?

The Witness: Yes, sir.

Mr. Grigsby: As soon as this deal was made?

The Witness: Yes, sir.

Mr. Grigsby: And you kept up the taxes? [16]

The Witness: Yes, sir.

Mr. Grigsby: Was there any agreement that you should keep up the taxes?

The Witness: No, but I believe the mortgage calls for keeping up taxes and keeping up any insurance if there are any buildings.

Mr. Grigsby: Now, have you got the note?

The Witness: Yes, sir.

Mr. Butcher: I have got the note.

(Testimony of Audrey Cutting.)

Mr. Grigsby: Have you offered it yet?

Mr. Butcher: I am going to offer it immediately.

Mr. Grigsby: This mortgage doesn't contain anything about taxes or insurance?

Mr. Butcher: We have the tax payments, too, Mr. Grigsby, which we are going to introduce.

Mr. Grigsby: You said that the mortgage stipulated the payment of taxes and such, will you see whether it does or not?

The Court: That does not go to its admissibility, Mr. Grigsby, do you object to the introduction of the mortgage—to the copy of the mortgage?

Mr. Grigsby: As far as I am concerned I don't object. I don't know how the rest of the counsel—

The Court: The question is whether there is objection to the admissibility of this instrument? Without objection it is submitted in evidence and marked as Exhibit No. 103. [17]

DEFENDANT'S EXHIBIT No. 103

Mortgage

This Mortgage, made this day of November, 1946, by and between Sylvia A. Henderson, of Anchorage, Alaska, party of the first part, hereinafter referred to as the Mortgagor, and Ralph R. Thomas, party of the second part, hereinafter referred to as the Mortgagee,

(Testimony of Audrey Cutting.)

Witnesseth:

That the mortgagor hereby mortgages to the mortgagee all that certain real property situate in the Territory of Alaska, Third Division, Anchorage Recording Precinct, more particularly described as follows, to wit:

Lot Two (2) in Block Thirty-seven D (37-D) of the South Addition to the Townsite of Anchorage, Alaska, according to the map and plat of the Welch Subdivision, which map and plat is on file in the office of the United States Commissioner and ex-Officio Recorder for Anchorage Recording Precinct, Anchorage, Alaska.

[Marginal Note]: 1/1/47, \$60—\$1450. 2/1/47, \$59.67—\$1400.

Together With All and Singular, the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, including the rents, issues and profits thereon, for the purpose of securing the performance of the promises and obligations of this mortgage, and the payment of the indebtedness evidence by one certain promissory note of even date herewith, in the principal sum of One Thousand Five Hundred Dollars (\$1,500.00).

The payment of attorney's fees in a reasonable sum to be fixed by the court if any attorney be employed to foreclose this mortgage; also all costs and expenses of suit, and also such sums as said

(Testimony of Audrey Cutting.)

mortgagee may pay as premiums on insurance on said property, or any expenses which the mortgagee may incur to preserve said property, or the title thereof, all of which said sums, including said attorney's fee are hereby declared a lien against said property and are secured hereby.

The mortgagor agrees to keep said property in good condition and repair, and to permit no waste thereof.

In the event of default on the part of the mortgagor herein in the payment of said note, or interest when due, or in event of breach of any of the covenants herein contained, then in that event, the whole of the principal sum herein, together with all other sums, and interest, shall become due and payable immediately.

Every covenant, stipulation and agreement herein contained shall bind and inure to the benefit of said parties, their heirs, executors, administrators and/or assigns.

Witness the hand and seal of the mortgagor the day and year first above written.

Witnesses:

.....
.....

United States of America,
Territory of Alaska—ss.

This Is to Certify that on this day of November, 1946, before me, the undersigned, a Notary

(Testimony of Audrey Cutting.)

Public in and for Alaska, duly commissioned and sworn as such, personally appeared Sylvia A. Henderson, known to me, and known to be the particular individual named in and who executed the foregoing instrument, and acknowledged to me that she signed the same freely and voluntarily for the uses and purposes therein stated.

Witness my hand and official seal the day and year first in this certificate written.

.....

Notary Public in and for
Alaska.

My commission expires:

You may proceed, Mr. Butcher.

Q. (By Mr. Butcher): I hand you this paper and ask you to state what it is if you know?

A. It is a note for \$1500.00.

Q. Executed between whom?

A. Executed between Ralph R. Thomas and Sylvia A. Henderson and Audrey Cutting.

Q. Does Sylvia Henderson's name appear thereon? A. Yes, sir.

The Court: May I see the note.

Q. (By Mr. Butcher): And is that Sylvia Henderson's signature?

A. Yes, sir, as nearly as I can remember.

Q. Well, do you know whether it is or whether it isn't by looking at it?

(Testimony of Audrey Cutting.)

A. Yes, it is her signature.

Q. What is the date of the note?

A. December 4, 1946.

Q. Do you know if it is the mortgaged note executed in connection with the mortgage which we have been just discussing? A. Yes, sir.

Q. It is? A. Yes, sir.

Mr. Butcher: Your Honor, I offer this note. [18]

The Court: It may be shown to other counsel.

Mr. Grigsby: No objection on my part.

The Court: It may be admitted in evidence and marked Defendant's Exhibit No. 104.

DEFENDANT'S EXHIBIT No. 104

\$1500.00

Dec., 1946.

For value received I promise to pay to Ralph R. Thomas on order One thousand five hundred and no/100 Dollars in Lawful Money of the United States of America with interest thereon in Lawful Money at the rate of eight per cent per year from date until paid payable in monthly installments of not less than \$50.00 in any one payment together with the full amount of interest due on this note at time of payment of each installment. The first payment, to be made on the fourth day of January, 1946, and a like payment on the fourth day of month thereafter, until the whole sum, principal and interest has been paid, if any of said installments are not so paid, the whole of said principal sum and interest, to become immediately due and collectible at

(Testimony of Audrey Cutting.)

the option of the holder of this note. And in case suit or action is instituted to collect this note or any portion thereof I promise to pay such additional sum as the Court may adjudge reasonable as attorneys fees in said suit or action.

Due 194...

At Anchorage, Alaska.

/s/ SYLVIA A. HENDERSON,

/s/ AUDREY CUTTING.

[Marginal Note]: Paid by check 753.

Mr. Butcher, you may proceed.

Mr. Butcher: Your Honor, I need the mortgage.

Q. Now, Mrs. Cutting, I believe you said that this was drawn up for you in the office of McCutcheon and Nesbett? A. Yes, sir.

Q. And it was signed in that office?

A. Yes, sir.

Q. And it was notarized in that office?

A. Yes, sir.

Q. And prior to the signing of this mortgage do you recall whether the deed was delivered to Sylvia Henderson or not?

A. Yes, but all of the papers were left in escrow in the bank.

Q. Well, you answer my question. In the McCutcheon office was there a delivery made of the deed?

(Testimony of Audrey Cutting.)

Mr. Kay: I object, Your Honor, she has answered.

The Court: Overruled.

Q. (By Mr. Butcher): When these papers were executed in the McCutcheon law office was there a delivery of the deed to Sylvia Henderson?

A. There was. [19]

Q. And following that I believe you testified that Sylvia Henderson executed this mortgage?

A. Yes, sir.

Q. And she signed this? A. Yes, sir.

Q. And she signed the note? A. Yes, sir.

Q. And then who took possession of the papers?

A. Well, I don't just recall. They were left in Mr. McCutcheon's office.

Q. And do you know what happened to them after that?

A. They were put in the Union Bank for collection.

Q. And they remained there until the note was paid off? A. Yes, sir.

Q. And then you received all the papers?

A. Yes, sir.

Q. And do you recall whether you received the original mortgage or not?

A. They said they gave me all of the papers that were in the file so I naturally took it for granted that I had the original mortgage.

Q. I believe you stated from the time of this transaction you paid taxes on the property?

A. Yes, sir.

(Testimony of Audrey Cutting.)

Q. You paid these personally? [20]

A. Yes, sir.

Q. To the City of Anchorage?

A. Yes, sir.

Q. By the way, do you know of any effort made to record the deed at the time the papers were signed?

A. No, I do not.

Q. You don't know anything about that?

(No response.)

Mr. Grigsby: What was that question?

Mr. Butcher: I asked her if she remembered any effort to record the deed at the time it was signed.

Q. I hand you these tax notices from the City of Anchorage and ask you to tell me if you—here is a tax notice for lot 237-D assessed to Ralph R. Thomas and it is for the year payable January 1st, 1948, and I would like you to examine that and tell me if you paid the amount assessed?

A. Yes, I did. It is written here. "Received of Audrey Cutting."

Q. And for whom did you pay those taxes?

A. Paid them for Sylvia.

Mr. Butcher: May I offer these altogether, Your Honor, rather than singly?

The Court: It may be shown to opposing counsel, and they may be offered together as far as I know.

What are these—tax receipts? [21]

Mr. Butcher: Yes, Your Honor.

Mr. Grigsby: We have no objection.

(Testimony of Audrey Cutting.)

The Court: They may be admitted as a unit and stapled together unless counsel has objection.

Mr. Grigsby: No objection to any.

The Court: They may be marked Defendant's 105.

Q. (By Mr. Butcher): Mrs. Cutting, just one further question. Now in connection with your daughter, Sylvia, other than the \$50.00 a month which you testified you receive for Sylvia, do you receive any other source of income for the support of Sylvia? A. No, I support her myself.

Q. You make your own living and support yourself? A. Yes, sir.

Q. Do you have any other dependents?

A. Yes, sir.

Q. Who do you support besides Sylvia?

Mr. Grigsby: What is the materiality of this?

The Court: What is the materiality of it, Mr. Butcher?

Mr. Butcher: To show, Your Honor, that Sylvia Henderson as owner of the property is entirely dependent upon Mrs. Cutting for her support apart from this \$50.00 per month and without Mrs. Cutting's care and support of her she would have no one to look to for a source of livelihood or for support of any kind for her education and health.

The Court: The last question was whether Mrs. Cutting had any other dependents. I think it is wholly irrelevant unless counsel can show me how it has any issue in this case.

(Testimony of Audrey Cutting.)

Mr. Butcher: I think in an equitable action the circumstances of Sylvia Henderson, who is the true owner of this property and against whom the foreclosure must occur, if any, if such property is needed for her education and support and well being in the future and that she has no one else to look to other than her mother, that it would go to the equities.

The Court: Not as to other dependents as I can see it. The objection is sustained.

Mr. Butcher: Withdraw the question. That is all at this time, Your Honor.

The Court: Do other counsel care to examine?

Cross-Examination

By Mr. Grigsby:

Q. Mrs. Cutting, now with reference to this transaction, acting for Sylvia Henderson you arranged with Ralph R. Thomas to buy this property for the sum of \$1800? A. Yes, sir.

Q. \$300 down and the balance of payments of \$50 per month? A. Yes, sir.

Q. And you gave them a note for the balance of \$1500? A. And the mortgage.

Q. What is that? [23]

A. And the mortgage.

Q. And a mortgage to secure that note and he gave you a deed? A. Yes, sir.

Q. Now there was no escrow agreement?

A. No, sir.

(Testimony of Audrey Cutting.)

Q. Was the deed and the mortgage both left at Mr. McCutcheon's office? A. Yes, sir.

Q. Was the deed drawn in McCutcheon's office?

A. Yes, sir.

Q. And was Mrs. Albert A. Moore in Mr. McCutcheon's office when she witnessed it?

A. Mrs. Moore was my secretary at the time.

Q. Didn't you say you took this over and executed it in your office? You are the notary on this deed?

A. If you will recall, Mr. Grigsby, at the time of the signing of that deed my office immediately adjoined Mr. McCutcheon's office on the lower floor of the McCutcheon's building.

Q. You are the notary on the deed?

A. Yes, sir.

Q. And then the deed and the mortgage both were left in McCutcheon's office? A. Yes, sir.

Q. Mr. Thomas was there at the time?

A. Yes, sir. [24]

Q. It was the same day?

A. The mortgage was prepared the same day.

Q. As the deed and the note also?

A. Yes, sir.

Q. The note is dated December 4th?

A. Yes, sir.

Q. Which is several days after the date of the deed? A. Yes, sir.

Q. All right, where was that prepared?

A. The note and the mortgage were prepared all in the same office.

(Testimony of Audrey Cutting.)

Q. All right, now, the mortgage was dated the same day as the deed, you say, and it purports on the copy you have to be dated in November blank. When was it executed?

A. Well, the mortgage was executed after the deed was signed.

Q. The same day? A. No.

Q. Well, you just now said it was the same day?

A. No, you asked me if it was prepared the same day.

Q. When was it executed?

A. I wouldn't know. It wasn't on the same day the deed was made.

Q. But it was prepared on the same day?

A. Yes, sir.

Q. On November 30th? [25] A. Yes, sir.

Q. And when was it executed?

(No response.)

Q. What was the arrangement when you got this deed?

A. Well, the mortgage wasn't signed on the same day that the deed was signed. It was not but what day it was signed I wouldn't say for sure. The note says December 4th so I assume the mortgage was signed the same day.

Q. Now, what was the arrangement when you got this deed as to the payment for the property as to whether it would be escrow or a mortgage? Was an arrangement made then that a mortgage would be made?

A. Well, after the deed was signed, yes, there

(Testimony of Audrey Cutting.)

was arrangements made about the mortgage and where it was to be paid.

Q. After the deed was signed? A. Yes, sir.

Q. You didn't have any agreement before that?

A. No, sir.

Q. So Mr. Thomas just left you a deed—an absent deed—without getting a mortgage or note or security whatever?

A. He left the deed with Mr. McCutcheon. He left it in Mr. McCutcheon's care until the mortgage was prepared. He was supposed to come back in and sign it but he didn't that day, so that is what accounts——

Q. He didn't sign the deed that day? [26]

A. He signed the deed that day but not the mortgage.

Q. He came back subsequently and in the meantime the mortgage was signed by Sylvia Henderson?

A. Yes, sir.

Q. Well, did he come back and get it?

A. Well, he must have, I don't recall just what——

Q. He never did get it, did he? You said they were both left in the office?

A. Well, they were left in the office.

Q. Well, there was no necessity for an escrow then. He hadn't been given an executed deed and take an absolute mortgage back so these papers were put by you for safekeeping in the bank?

(Testimony of Audrey Cutting.)

A. No, the deed and the mortgage and the note were altogether.

Q. Why didn't you go record them?

A. Why didn't I what?

Q. Record it?

A. Well, it was automatically at that time, most of the banks, all recorded the instruments as they came in and then deducted the amount from the bank account, but evidently they didn't do that. They only recorded on the front of the statement. It says Mortgage Not Recorded but nobody did anything about it and it wasn't called to my attention so I didn't know anything about it.

Q. Mrs. Cutting, you said this deed was delivered to Sylvia [27] in McCutcheon's office?

A. That deed was left in McCutcheon's office, yes.

Q. You said it was delivered to Sylvia in McCutcheon's office?

A. Well, from the first you have got this all twisted up, Mr. Grigsby, I said the deed was left in McCutcheon's office. The mortgage was left in McCutcheon's office; the note was left in McCutcheon's office and Mr. McCutcheon made arrangements with Mr. Thomas to leave the deed and the mortgage and the note in the Union Bank for collection.

Q. Then there was no delivery to Sylvia of the deed, is that right?

A. Well, it was signed. I don't know just what

(Testimony of Audrey Cutting.)

you mean by the word "delivery," Mr. Grigsby.

Q. Was it handed her or you for her?

A. Well, Mr. McCutcheon was my attorney and I took it for granted it was delivered to her for it was delivered to him for safekeeping.

Q. There was no escrow agreement whatever?

A. No.

Q. When were you to get this deed and have the privilege of recording it. The property was mortgaged back to him. Couldn't you have recorded it anytime you wanted to?

A. Yes, that is usually the form, the deed is usually recorded and the mortgage is recorded.

Q. But it wasn't done? [28]

A. Evidently not.

Q. And you didn't get that deed at all from the bank until you paid this note, did you—when you paid the balance of this note on July 1st, 1946, you got the deed out of the bank, didn't you?

A. Yes, sir.

Q. And then you didn't record it until August 4th?

A. No. You see I sent a check to the bank—I was busy at the time—for the full amount. I called them up and they told me what the full amount was.

Q. What was the full amount?

A. Four and some—seven hundred dollars.

Q. You didn't keep the payments up?

A. Yes, sir.

(Testimony of Audrey Cutting.)

Q. Where did you pay that?

A. To the Union Bank.

Q. All of it? A. Yes, sir.

Q. Now, isn't it a fact that there is a condition in this deed that you build a house within two years?

A. That was something that I didn't know either until after I got the deed.

Q. You didn't know that when you first saw the deed?

Mr. Butcher: Your Honor, I object to any questioning as to the conditions contained in the deed.

The Witness: No restrictions were mentioned.

Mr. Butcher: If there are any restrictions in the deed that is a matter between the grantor and the grantee and hasn't anything to do with this case.

The Court: Objection is overruled.

Q. (By Mr. Grigsby): Was there—was this the reason that these papers were put in the bank because they weren't to be delivered until you had complied with this provision in the deed to construct the building? A. No.

Q. It had nothing to do with it?

A. Not that I know. Building the building was never mentioned to me.

Q. What is that?

A. The restrictions were never mentioned to me.

Q. No restrictions were mentioned to you?

A. No, sir.

(Testimony of Audrey Cutting.)

Q. And you gave a note and you saw the papers which was made out here on the 30th of November for which you gave a note afterwards and here you obligate yourself to pay and did pay three-hundred cash down and you didn't read the instrument?

A. I must have read it but probably not close enough.

Q. And you didn't know anything about that deed having a covenant in it that you had to finish a house within two years? [29]

A. If it did I had forgotten about it.

Q. In any event you did complete a house within two years? A. Yes.

Q. And the house was completed on July 1st when you paid the balance of the money, wasn't it?

A. Well, I wouldn't say just exactly that it was all completed because at that time we were having our discussions with Mr. Smith about the basement.

Q. But there was no more work done on it after that time, was it?

A. Yes, Mr. Smith went out there and did some dirt work around the place for me.

Q. After July 1st? A. Yes, sir.

Q. There were no carpenters working out there after July 1st?

A. I wouldn't say that.

Q. You know, don't you?

A. No, I don't.

Q. There might have been carpenters working, these carpenters here in the court room, they were working out there after July 1st?

(Testimony of Audrey Cutting.)

A. Mr. Smith could have called them back for work they didn't finish.

Q. Anyone else could have done that in your absence? Did you ever see any of these men after July 1st? [30]

A. I wasn't there 24 hours a day.

Q. Did you at any time when you were there see any of these men working after July 1st?

A. No.

Q. As a matter of fact you know that these men ceased working before July 1st? A. I don't.

Q. You don't?

Mr. Butcher: I think the witness testified that she doesn't know.

Q. (By Mr. Grigsby): Mrs. Cutting, you testified about leaving that form of a non-liability notice. I don't believe you said when it was you found it with reference to when you prepared your form from it. Do you know when it was you found it?

A. Of what are you speaking, Mr. Grigsby?

Q. The form of non-liability for liens notices which is in evidence here and which you said you found in a gutter.

The Court: Not the one in evidence.

Q. (By Mr. Grigsby): The notice you prepared is in evidence?

Mr. Butcher: Your Honor, I think Mr. Grigsby has misunderstood the examination of the defendant; she found a form from which she made——

Mr. Grigsby: That is exactly my question.

(Testimony of Audrey Cutting.)

The Court: It wasn't clear. The Court interposed.

Q. (By Mr. Grigsby): All right. When did you find the form from which you prepared this notice?

A. Mr. Grigsby, I would like to at this time retract the statement I made in the Court when I testified to the fact that I found a lien notice in the gutter. I am very sorry.

Q. Well, where did you get it?

A. I got the lien notice form from my real estate books that I have.

Q. Where? A. Real estate books.

Q. Forms in a real estate form book?

A. Yes, sir.

Q. And when did you get that?

A. Well, I have had those for some time.

Q. All right, when was it called to your attention first from which you prepared this notice?

A. When was it called to my attention?

Q. Yes.

A. What do you mean by that question, will you explain it?

Q. Well, the other day you said you prepared this notice from a form you found in the gutter and you saw it was suitable for the occasion so you at that time or subsequently prepared your [32] lien notice from it. Now will you just state how and when you prepared this notice from the form you found in your office and when this form in your office came to your attention?

(Testimony of Audrey Cutting.)

A. Well, I had typed it and kept it as the form on record.

Q. What is that?

A. I had typed it from the book and keep it on record in my office.

Q. For future use? A. Yes, sir.

Q. And do you know when you typed it from that book? A. I had my secretary type it.

Q. How long was it before you had occasion to make up the form from it—some considerable time?

A. Oh, yes, ever since I started in the real estate business I had lien notices.

The Court: Wait a minute, I didn't hear your last statement.

The Witness: I said ever since I began in the real estate business I had lien notice forms.

Q. (By Mr. Grigsby): And is that a printed form in a real estate book you have?

A. Yes, sir.

Q. And you own the book? A. Yes, sir.

Q. And you had your secretary make a copy of that? [33]

A. Yes, she copied a copy from the form, yes.

Q. Not this? A. Well, yes.

Q. This particular paper?

A. Yes, she typed that.

Q. Is that the only thing she got from that form? A. Yes, sir.

Q. And you knew about that form ever since you

(Testimony of Audrey Cutting.)

went in the real estate business? A. Yes, sir.

Q. When did you have her copy this?

A. Immediately after signing the contract.

Q. On November 30th—you mean your contract with Smith? A. Yes.

Q. That would be the same day that you posted it or the day before?

A. Well, we signed the contract on the 30th of April and I know I was very busy that day and I didn't have time to type it myself and at that time I had hired a secretary to work for me and she came to work the following day and I asked her the first job to do was to type that.

Q. Now on the 30th you got a contract with Smith under which he was to build a building for you? A. Yes, sir.

Q. And then you remembered on that occasion or immediately [34] after that you had seen a form in a form book of notice of non-liability, didn't you? A. Yes.

Q. So you immediately as soon as you could get it done—— A. Yes.

Q. ——had this notice made and the next day went out and posted it, is that right?

A. No, immediately after signing the contract; the lien notices were typed on May 1st, and I went out that evening and posted them on May 1st. It wasn't the next day; it was on May 1st.

Q. It was the next day after April 30th? The contract was signed on April 30th?

(Testimony of Audrey Cutting.)

A. I wasn't just clear on what you mean by the "first day"?

Q. And the first job you had done the next morning having contracted to build a building for your daughter, in your name of course the contract was, you had in mind the notice that you had run across when you first went in the real estate business, so you had your secretary the next day make out this notice and that night took it out there and posted it?

A. Yes, that was Mr. McCutcheon's instructions.

Q. So the contract you had posted to have a building built on wouldn't be liable?

A. Yes, that is correct.

Q. And so far it hasn't been liable, is that right?

Mr. Butcher: I don't believe the question makes sense. [35]

Mr. Grigsby: Withdraw the last question.

The Court: Question withdrawn.

Q. (By Mr. Grigsby): Now are you sorry that you retracted this statement about finding this in the gutter? A. Yes. sir.

Q. Now you were under oath the other day when you said you found this in the gutter. Now you say you didn't find it in the gutter?

A. That is correct.

Q. Why did you say you did find it in the gutter? A. And did I say that?

Q. Yes.

A. Well, Mr. Kay was the one who directed the questions at me and I had already given my prom-

(Testimony of Audrey Cutting.)

ise to the Bar Association that the real estate profession and the real estate dealers here in Anchorage—I was secretary of the Real Estate Board—and I was not to practice law without passing bar examinations. So I thought it was rather a leading question and caught me unawares.

Q. So you thought it would be better to perjure yourself rather than violate the law against practicing law, is that it?

A. It wasn't exactly perjury. I was ashamed.

Q. You were——. You swore under oath you went along the street and found this paper in the gutter and swore it under [36] oath and the reason you did that was because you knew or thought you didn't have a right to make up a form even for yourself because you would be practicing law?

A. Yes, sir, because I didn't know.

Q. It was fear of the prosecution of practicing law?

A. Yes, sir.

Q. And you found no paper in the gutter?

A. No, sir.

Q. No form? A. No, sir.

Q. However, you did post the notices the next day—the notice, this one—on a tool box or in the basement, or one like this on a tool box?

A. Yes, sir.

Q. May 1st? A. Yes, sir.

Q. And you are still sure of that?

A. Yes, sir.

Q. Did you know Thomas personally?

(Testimony of Audrey Cutting.)

A. No, sir.

Q. Did you ever see him around here during the time that you had possession of this property?

A. Repeat that again?

Q. Did you ever see him around Anchorage during the time you had possession of this property after November 30, 1946? [37]

A. I saw him once.

Q. What? A. Once.

Q. Just once, and that was on the occasion of this transaction? A. No, after that.

Q. When you paid him up?

A. No, it was before that.

Q. When was that?

A. Oh, I would say the year before. It was the summer before was my last conversation with him in 1947.

Q. You mean 1948 or 1947?

A. 1947. No, I didn't see him this last summer at all.

The Court: The Court will stand in recess until ten minutes past eleven.

(Short recess.)

The Court: Is there any other counsel who have not examined this witness who would care to?

Mr. Kay: I would like to ask a few questions, Your Honor, about this recent testimony.

The Court: Have you examined her before?

Mr. Kay: Yes. I cross-examined previous to this testimony this morning.

(Testimony of Audrey Cutting.)

The Court: I think the counsel should confine himself to the claims of the parties he represents because the general field has been covered by Mr. Grigsby. [38]

Q. (By Mr. Grigsby): Mrs. Cutting, have you got that book now with that form in it?

A. Yes, sir.

Q. And could you produce it? A. Yes, sir.

Q. Will you please do so this afternoon?

A. Yes, sir.

Q. Can you explain to me why it was necessary to put that deed in the custody of the bank? You have stated that the note was left there for collection purposes?

A. Why was the deed left in the bank?

Q. Yes.

A. Well, that I don't know.

Q. You don't know?

A. You would have to take that up with Mr. McCutcheon.

Mr. Grigsby: That is all.

The Court: Any other counsel care to examine who has not examined?

(No response.)

The Court: Any redirect?

Redirect Examination

By Mr. Butcher:

Q. Mrs. Cutting, in connection with your answers to Mr. Grigsby's questions about this lien or

(Testimony of Audrey Cutting.)

notice of non-responsibility, [39] had you ever on previous occasions had occasion to use any of these forms? A. (No response.)

Q. Had you ever built a house before?

A. Yes, we were in the process of building and repairing a home out on Lennets Street.

Q. And had you personally ever used any of the forms before? A. Not to my recollection.

Q. Were you familiar with the use of the forms?

A. No, sir.

Q. Did you know that such forms were necessary? A. Yes, sir.

Q. How did you come to know that?

A. Because Mr. McCutcheon told me so.

Q. He advised you as counsel that they were necessary. A. Yes, sir.

Q. In this case? A. Yes, sir.

Q. But he didn't draw a form for you?

A. No, sir, he told me they were very simple and for me to draw them myself.

Q. Now did you have a conversation after you testified on the witness stand that you found this form in the gutter? Did you talk to me about the matter? A. Yes, I did. [40]

Q. And do you recall my asking you why you stated you found it in the gutter?

A. Yes, sir.

Q. And do you recall what you told me?

A. Yes, sir.

Q. And what was that?

(Testimony of Audrey Cutting.)

A. I told you that as the Secretary of the Board of Realtors of Anchorage that I had given my promise to Mr. Plummer that the real estate profession here, that none of the realtors were preparing any of their own legal documents or practicing law.

Q. And you were fearful that there was going to be an attempt made to have you answer a question which would incriminate you?

A. Yes, sir.

Mr. Kay: Your Honor, may we ask that Mr. Butcher cease to testify and quit answering questions.

Mr. Butcher: She has answered that it was for fear of prosecution.

The Court: Objection is sustained nevertheless.

Q. (By Mr. Butcher): And do you remember in our conversation what I told you?

A. Yes. You told me I had a perfect right to draw my own lien notices on the property because it was our own and I was acting as a guardian for Sylvia.

Q. And what did I tell you about what you should do about having previously testified? [41]

A. You asked me to retract the statement that I had last made in court and tell them that I had just—just exactly what I had done.

Q. Had you ever had the property surveyed out there? A. Yes, sir.

Q. Do you recall who surveyed it?

(Testimony of Audrey Cutting.)

A. Mr. Frank DeLaReyes.

Q. Is he a licensed surveyor?

A. Yes, I believe he is.

Q. And do you recall the date on which he surveyed the property?

A. It was on April 23rd.

Q. Of what year? A. 1948.

Q. Did he lay the entire lot out at that time?

A. Yes, sir.

Q. Did he at that time deliver to you a statement of the survey?

A. Yes, sir, I have a copy of it there in my file.

Q. You have a copy in your file?

A. Yes, sir.

Q. Where is your file, Mrs. Cutting?

A. Miss Sollee has it.

Q. Do you know that Mr. DeLaReyes signed this?

A. That is his usual signature, yes. [42]

Q. Did you see him sign it?

A. No, I didn't see him sign it.

Q. This was mailed to you?

A. Yes, his assistant usually brings them in the office and receives payment at that time.

Mr. Butcher: Now, your Honor, I can bring Mr. DeLaReyes here and have him certify that this was his signature but I believe that counsel might stipulate that it is.

Mr. Grigsby: What is the purpose of it?

Mr. Butcher: Your Honor, there has been a

(Testimony of Audrey Cutting.)

great deal of testimony, particularly on cross-examination, whether a certain pile of lumber which is material to the case, whether it was on one side of the line and this will establish the fact that a survey was made and that the line was marked on the 23rd day of April when one of the lien claimants claims to have started his work.

Mr. Grigsby: We have no objection. I still don't see the materiality of a survey.

Mr. Butcher: We offer this as an exhibit.

The Court: It may be admitted and marked Defendant's Exhibit No. 106. Certificate of survey 23 April 1948. Counsel may proceed.

Recross-Examination

By Mr. Grigsby:

Q. Mrs. Cutting, before you testified about that form, about which you made the notice of which is in evidence, you had shown Mr. Butcher that notice of lien that was in evidence, [43] hadn't you?

A. Yes, I had showed him a copy of the lien.

Q. You showed him that identical paper that is in evidence, didn't you? A. Yes.

Q. And told him that you had found it, too, didn't you? You told him you had found the form from which you drew it?

A. We didn't discuss that.

Q. Didn't he ask you where you had got the form? A. No, sir.

Q. He took and read it, did he?

(Testimony of Audrey Cutting.)

A. Yes, sir.

Q. And you told him that it was one of the notices that you had posted upon the premises?

A. Yes, sir.

Q. And he asked you who drew it?

A. No, sir.

Q. And you didn't tell him? A. No.

Q. Did you—he didn't ask you where you got it? A. No, sir.

Q. And you hadn't told him that you had got it in a gutter? A. No, sir.

Q. Now this property surveyed there, what is lot 2—an ordinary sized lot? [44]

A. Well, what do you mean by "ordinary sized lot"?

Q. Ordinary size residence lot 50 by 120?

A. No, 50 by 140.

Q. 50 by 140, I mean. That is the lot on which you put this building? A. Yes, sir.

Q. And that is the usual sized residence lot in the City of Anchorage? A. Yes, sir.

The Court: That is all, you may step down and another witness may be called.

(Witness excused.)

Mr. Butcher: Call Mrs. Sollee.

ICEL SOLLEE

called as a witness herein, being first duly sworn, testified as follows:

Direct Examination

By Mr. Butcher:

Q. Will you state your name to the Court?

A. Icel Sollee.

Q. You live in Anchorage, do you, Mrs. Sollee?

A. Yes.

Q. And you are employed as Secretary by Mrs. Cutting? A. I was but I am not now.

Q. You were employed in her real estate office?

A. Yes, I was.

Q. When did you cease working for Mrs. Cutting?

A. I don't recall the exact date. I believe it was around the first of September.

Q. Do you recall when you went to work for Mrs. Cutting? A. It was on May 1st.

Q. May 1st of what year? A. 1948.

Q. And had Mrs. Cutting made some arrangements with you about coming to work for her?

A. Yes, I had talked to her some four days before but I hadn't planned on going to work until Monday and she called me to work on Saturday which would be May 1st, I believe. She called me.

Q. She called you to come down and you went to work on Saturday? A. Yes.

Q. Where is that office?

A. It is located in the Pearl Building.

(Testimony of Icel Sollee.)

Q. That is the office where you went to work?

A. Yes.

Mr. Butcher: May I have the lien notice?

Mr. Robison: Here it is.

Q. (By Mr. Butcher): I hand you this paper marked "Lien Notice" and ask you whether you have ever seen it before? [46]

A. Yes, I have.

Q. Did you type that notice?

A. I didn't type this notice here but I typed, I think, four or five, I don't remember, off from this notice.

The Court: I didn't understand.

The Witness: I didn't type this notice here. Mrs. Cutting handed that one to me. But I did type four or five, I don't remember just which, off from this copy here.

Q. (By Mr. Butcher): You mean by that you made extra copies of that notice?

A. Yes, I did.

Q. And do you recall when you did that work?

A. It was on May 1st.

Q. It was on May 1st? A. Yes.

Q. How do you know it was on May 1st?

A. Well, that was the first day I had come to work and that was the first work I was given to do and I had never seen a lien notice before, so I remember it.

Q. And you have looked at it carefully and you know? A. Yes.

(Testimony of Icel Sollee.)

Q. When you type a notice and date it yourself do you usually put the date on which you do it?

A. Yes, I do unless Mrs. Cutting tells me otherwise.

Q. And in this case——? [47]

A. In this case I put the date on which I did it, May 1st.

Q. During the course of your work for Mrs. Cutting you have done all sorts of real estate work—you have drawn deeds and contracts and made copies of papers of different kinds—you have done general secretarial work in a real estate office, have you?

A. Yes.

Mr. Butcher: That is all.

Cross-Examination

By Mr. Grigsby:

Q. Mrs. Sollee you say you didn't write this particular paper?

A. No, I didn't.

Q. But this particular paper was handed you the first morning that you went to work?

A. Yes, it was.

Q. And was it signed at that time?

A. No, I don't believe so. I don't remember for sure whether it was or not.

Q. And do you remember what time of day you did this particular work on May 1st?

A. No, I don't. It was in the morning or afternoon.

Q. Was it the first job you did?

(Testimony of Icel Sollee.)

A. Well, I was typing up some personal letters along with it.

Q. And Mrs. Cutting handed you this identical paper and asked you to make some copies of it?

A. Yes.

Q. And had she prepared that in your presence that day? [48]

A. No, I didn't say that: I don't remember that.

Q. You don't know where she got it?

A. No.

The Court: What is the number of that?

Mr. Grigsby: This is Defendant's Exhibit No. 102.

Q. Did you use a form book in copying this?

A. I did not.

Q. You didn't see any form book? A. No.

Q. You just copied the notices you made from this paper? A. Yes.

Q. Do you know it is that particular paper?

A. Yes. I wouldn't be sure but I suppose it is. It is the only one I saw.

Q. Did you use the same typewriter on which this was drawn?

A. I don't know. I don't know where Mrs. Cutting done that work. That was handed to me and I didn't question her where she got it.

Q. How did you know you didn't write this one?

A. Well, I don't suppose I would be sure sure whether I did or not but she gave me this

(Testimony of Icel Sollee.)

notice here and then I typed the copies and they were posted right away, so I don't imagine——.

Q. She gave you a paper which could have been this or could have been another one like it?

A. Well, I imagine that was the only one. I wouldn't know. [49]

Q. There was only one but how do you know this was the only one she gave you?

A. After I typed them, too, she took them right away.

Q. And probably posted them as far as you know?

A. Yes.

Q. And you made one and several carbons, I suppose?

A. Yes.

Q. And the original was just like that?

A. Yes.

Q. How do you know that this isn't one of them that you made? Is there anything about it from which you would know?

A. I wouldn't know.

Q. But anyhow she did hand you some papers either this or one just like it?

A. Yes.

Q. From which you copied other notices?

A. Yes, sir.

Q. And she handed you that on May 1st already typed?

A. Yes.

Q. Was it signed?

A. I don't believe it was. I wouldn't remember for sure.

Q. (By Mr. Kay): Mrs. Sollee, do you remember whether the paper which Mrs. Cutting gave you

(Testimony of Icel Sollee.)

to type, did it have any pen or ink corrections on it or was it typed out exactly like this naming Sylvia [50] Henderson, Audrey Cutting and Smith?

A. I don't know whether it was corrected in any way or not, that has been quite awhile ago.

Q. I was just trying to refresh your recollection as to whether it was this or the other one?

A. I wouldn't be sure.

Q. You said you always dated the paper the day on which the work was done unless Mrs. Cutting told you otherwise? A. Yes.

Q. Does Mrs. Cutting sometimes tell you to date papers on other dates than the time you did it?

A. Yes.

Q. What kind?

A. It might be personal letters.

Q. No, legal papers?

A. I can't remember any legal papers.

The Court: Does other counsel have any cross-examination?

Mr. McCarrey: None.

The Court: That is all.

(Witness excused.)

Mr. Butcher: The other witness I have sent for has not arrived. I didn't realize we would move so rapidly. I have two or three other witnesses coming whom I have told to come this afternoon but I believe that it is possible to get the other witness down here now. He will be right here, Your [51] Honor.

The Court: The Court will stand in recess until 11:40.

(Short recess.)

ALBERT FOX

called as a witness herein, being first duly sworn, testified as follows:

Direct Examination

By Mr. Butcher:

Q. State your name to the Court?

A. Albert Fox.

Q. You are commonly known as Al Fox?

A. Yes, Al Fox.

Q. And you are in the electric business here?

A. Yes.

Q. I believe you own the D & D is that correct?

A. That is right.

Q. Where do you live, Mr. Fox?

A. I live on 10 E. "F."

Q. And who do you rent that property from?

A. Eddie Jones.

Q. From whom? A. Eddie Jones.

Q. Whose property is it?

A. It is Jones' property.

Q. No, I mean the house where you live? [52]

A. Audrey Cutting.

You mean the old house?

Q. Yes. I moved.

Q. When did you live in this house?

A. Well, lived from July up until a couple of months ago.

(Testimony of Albert Fox.)

Q. You moved there what date in July?

A. Sometime in the middle of July.

Mr. Stringer: Which house is he talking about, Your Honor?

Q. (By Mr. Butcher): Where is this house located, Mr. Fox?

A. It is 15th and "H," the old house.

Q. It is a new house?

A. Supposed to be.

Q. And built so far as you know by Mrs. Cutting? A. Yes.

Q. And when you moved in you were the first occupant?

A. I think I was. Everything seemed to be new. There was still paint on the floor.

Q. Painting on the floor? A. Yes.

Q. And you believe that that was sometime around the middle of July? A. Yes.

Mr. Robison: I didn't hear the answer to that question. [53] Did you say there was paint on——?

The Witness: Paint, some still on the floor—dribbles.

Q. (By Mr. Butcher): When did you move from the premises?

A. A couple of months ago, I think. I can't remember the exact date.

Q. And you don't remember the exact date? That probably could have been in December then; was it before Christmas?

A. I am pretty sure it was.

Q. I am going to hand you a paper and ask you

(Testimony of Albert Fox.)

to read it and tell us whether you have ever seen it before and under what circumstances?

A. Well, I think I did see this paper, in fact, I think that was the one I picked up off the floor.

Mr. Stringer: I didn't hear the answer.

The Witness: I think that is the lien notice I picked up off the floor down in the basement.

Mr. Stringer: In the basement of this house you occupied as a tenant?

The Witness: Yes, sir.

Q. (By Mr. Butcher): And that is the house out there on "H" and 14th? A. Yes.

Q. And whereabouts in the basement did you find the notice, Mr. Fox?

A. There was a lot of stuff strung around there. The reason [54] I was so particular in saving, I had a lien notice on D & D that Harry and I knew that she was having trouble. The attorneys called me up and tell me about it and I just thought I would save it for her.

Q. Did you find any other papers?

A. There was a building permit on the floor and I picked that up.

Q. Do you recall any other papers?

A. No, I don't know of the rest of them, that is about all.

Q. After you picked them up where did you put them?

A. Put them in the dresser drawer upstairs.

Q. When did you deliver them to Mrs. Cutting?

(Testimony of Albert Fox.)

A. She came out.

Q. Did you deliver all the papers to her?

A. All that I had.

Q. That you had picked up? A. Yes.

Q. And this lien notice was one of the papers?

A. I think it was. It was a lien notice. I know it looks like it.

Q. Had you seen the contents of that before?

A. Yes.

Q. And does that look like that?

A. That is why I saved it. I had the same thing on the D & D.

Q. And you saw the signatures on it at that time? [55]

A. Yes, sir.

Q. And you saw the signatures on it at the time?

A. Yes, sir.

Q. And would you say it was the same?

A. It looks like it?

Q. As far as you know this was the lien notice you picked up? A. Yes.

Mr. Butcher: That is all.

The Court: Counsel for plaintiffs may examine.

Mr. Grigsby: I have no question.

Mr. Kay: Just one question.

Cross-Examination

By Mr. Kay:

Q. Mr. Fox, had you ever been out to the place before you moved in? A. Yes.

(Testimony of Albert Fox.)

Q. How long before?

A. A day or two, I think.

Q. The day before you moved in?

A. I couldn't say, I was out there but I didn't pay any particular attention to the house.

Q. Did you see any lien notices at that time.

A. No, I didn't.

Q. Had you ever been out there previous to that?

A. Well, I think we rode out there one time in order to take [56] a picture of the house and that was all there was to it. We came back to town.

Q. Did you notice any lien notices on that occasion?

(No response.)

Q. Just on this occasion when you moved in?

A. Yes.

Q. How long after you moved in was it before you picked that lien notice off the floor?

A. A couple or three days.

Q. Had Mrs. Cutting been in the house during that time? A. No.

The Court: How do you know that?

The Witness: The wife was there during that time and I think she would tell me if Audrey had been down.

Mr. Kay: That is all.

(Testimony of Albert Fox.)

Redirect Examination

By Mr. Butcher:

Q. Mr. Fox, do you recall the condition of the house insofar as the construction was concerned when you moved in?

A. Well, I would say we were going to have open house on Thanksgiving and we got froze out. I gave Alaska Plumbers a check for working on the furnace—Bill's Electric for working on the furnace, and I had a carpenter working down at D & D named Roberts and he came down and opened the only window we could get open. The front door wouldn't close. The wife had to put the mangle in front of that door. And we can go out and look [57] at that house and that masonite in that bathroom was absolutely scraps. We never had any hot water in the bathroom and the washbowls especially until I got Cliff Hohn's man out there to fix it.

Q. And what was the condition, do you recall, as to weather proofing?

A. Well, the basement—weather-proofing in the basement leaked.

Q. What was the nature of the leaks, were the leaks from pipes or outside?

A. Outside. I know there was plenty of water down there. I was busy trying to fix up the D & D at that time and I didn't pay too much attention to it. That house was in the worse shape of any new house I ever seen in my life. A man came down

(Testimony of Albert Fox.)

to the place of business. Finally after I got down feeling around, he was one of the men who was testifying, he was the man who fixed the masonry on the house, I told him what I thought of it.

Q. Who was that man?

A. I think it is that gentleman sitting over there, if I am not mistaken.

Q. Which one?

A. The gentleman right there.

Q. This gentleman right here? A. Yes.

Q. When was this he talked to you, Al? [58]

A. Saturday night.

Mr. Grisby: What Saturday night?

The Witness: This last Saturday night—night before last.

Q. (By Mr. Butcher): What was he talking to you about—the condition of the house?

Mr. Grigsby: Object to what conversation was had Saturday night.

The Court: If it was something the witness said in contribution to the testimony he made; otherwise not.

Mr. Butcher: Well, that is all.

Mr. Grigsby: No cross.

The Court: You may step down.

(Witness excused.)

Mr. Butcher: You Honor, may we suspend at this time. I have several other witnesses but I arranged for them to all come this afternoon and

they are all working people and I would have had to have brought them in from their work.

The Court: Do counsel wish to reassemble before two o'clock?

Mr. Grigsby: If Mr. Butchers' witnesses will be here before two.

Mr. Butcher: I arranged for them to be here at two.

The Court: There is not much point in trying to go along before two then. [59] Court stands adjourned until 2:00 p.m. this afternoon.

(Whereupon, at 12 Noon the Court recessed until 2:00 p.m. the same day. [60])

Afternoon Session

The Court: The witness may be called in behalf of the defendants.

Mr. Butcher: Call Mrs. Annabel—Mrs. Squyres.

MARY JANE SQUYRES

called as a witness herein, being first duly sworn, testified as follows:

Direct Examination

By Mr. Butcher:

Q. Will you state your name?

A. Mary Jane Squyres.

Q. Where are you employed, Mrs. Squyres?

A. I am employed at the Alaska Railroad.

Q. And Anchorage is your residence?

(Testimony of Mary Jane Squyres.)

A. That is right.

Q. And were you formerly employed as Secretary to Mr. Stanley McCutcheon?

A. Stanley and Nesbett.

Q. By the firm of McCutcheon and Nesbett as secretary? A. That is right.

Q. And during the course of your work it was your duty to type various legal documents?

A. Yes, sir.

Q. And to witness signatures occasionally?

A. Yes, sir. [61]

Q. I am going to hand you a copy of the warranty deed and ask you to examine it and determine if possible whether you prepared it and if you don't remember that if that is your signature that appears thereon as witness? A. The Signature is mine.

Mr. Stringer: Your Honor, I am not able to hear the witness.

The Court: Neither have I.

Q. (By Mr. Butcher): Did counsel hear the question?

The Court: She says the signature is mine.

Q. (By Mr. Butcher): The signature is yours?

A. Yes.

Q. And do you recall Mr. Thomas whose signature appears on there as grantor as signing it?

A. No, sir.

Q. You don't remember that; all you can identify is the signature? A. That is right.

Q. And you know if the signature is on there you witnesses the signing? A. Yes, sir.

(Testimony of Mary Jane Squyres.)

Mr. Butcher: That is all, your Honor.

The Court: Any cross-examination?

Mr. Grigsby: No cross. [62]

(Witness excused.)

Mr. Butcher: Call Mr. Seifert.

RAYMOND A. SEIFERT

called as a witness herein, being first duly sworn, testified as follows:

Direct Examination

By Mr. Butcher:

Q. Will you state your name to the Court?

A. Raymond A. Seifert.

Q. You are a major in the United States Army?

A. Yes, sir.

Q. You reside in Anchorage? A. Yes, sir.

Q. You have a home here? A. Yes, sir.

Q. Where is that home located?

A. The address is 1424 "H" Street, lot 3, block 37-D, South Addition to Anchorage.

Q. Is this the home that Russell Smith constructed for you? A. No, sir.

Q. Did he construct part of it for you?

A. He constructed a small 8 and 1/2 by 9 room, approximately that size, and it was pretty well built before.

Q. You simply had an addition put on?

A. That is right. [63]

(Testimony of Raymond A. Seifert.)

Q. And it was the addition Mr. Smith constructed, so you are well acquainted with Mr. Smith?

A. I wouldn't say well acquainted. I am acquainted with him through some work he did for me.

Q. Mr. Seifert, does your lot adjoin that lot on which Mrs. Cutting has had a home constructed?

A. Yes, sir.

Q. You know Mrs. Cutting?

A. I do since about 4 days ago—five days ago.

Q. You had never met her previously?

A. I had seen her previously.

Q. And you do recall when the construction commenced out on the property that Mr. Smith was working on adjoining yours?

A. I was absent at the time. I came back from emergency leave in the States. I came back on the last day of April and reached Fort Richardson about eleven o'clock at night and went to my home at the above address that I gave right after midnight. My family and I spent the night there.

Q. And do you recall about that time there being some lumber on the adjoining premises?

A. To the best of my recollection at that time they weren't doing anything but digging.

Q. Did they subsequently have some lumber piled out there? A. Subsequently they did.

The Court: What was the answer? [64]

The Witness: They did subsequently have lumber there.

Q. (By Mr. Butcher): Have you any idea from

(Testimony of Raymond A. Seifert.)

your own recollection as to when the lumber was put there?

A. Things are so vague; at that time I just completed a very strenuous trip up the Alcan Highway; that I can't recall just when the lumber came.

Q. But you do recall some lumber coming?

A. There was some lumber.

Q. And that lumber was used in the construction of a house? A. That is right.

Q. Do you recall more than one pile of lumber?

A. I think there were a number of piles of lumber of various sizes at different times.

Q. Now do you know of your own knowledge whether this lumber was on the property next door or on your property, if you know, tell the Court where you think it was?

A. To the best of my belief it was on the property next door. I purchased the place not long before.

Q. Were you acquainted with the property lines?

A. Fairly well, yes, sir. I was interest in it when I bought the property.

Q. Had there been a survey made recently?

A. They pointed out some stakes to me where they said was the property line. [65]

Q. And from your best recollection the lumber was on the other side? A. That is right.

Q. The side where they were doing the building?

A. Yes, sir.

Q. And not on your side? A. Yes, sir.

(Testimony of Raymond A. Seifert.)

Q. You say you arrived back on the 30th day of April? A. Yes, sir.

Q. And I believe your recollection didn't serve you sufficiently to remember whether or at least it was your recollection that the lumber came after that subsequent to that?

A. That is the way I recall it now but I won't swear there wasn't any there the next morning. I can't recall seeing any.

Q. And if I ask you any questions about it as to time you wouldn't remember, you couldn't identify time, you couldn't identify it as a week later that you saw lumber there, could you?

A. A week later? I would say it probably was because things moved very fast after they started.

Q. Do you remember seeing any large tool boxes setting out in your back yard?

A. The only tool box I remember was one I lent to them and that was a piano box.

Q. You lent to whom?

A. I lent to Mr. Smith.

Q. When and under what circumstances did you lend it to him? [66]

A. My furniture was delivered on May 6th by the Post. It was unpacked the same day I was home. I came home while the lumber—while the household goods were being delivered. We unpacked all of it that day and took it in the house. We didn't unpack all of it we unpacked some of it. It was sometime after that before we lent them the box. The piano wasn't uncrated that day.

(Testimony of Raymond A. Seifert.)

Q. It wasn't—— A. It was——

Q. ——uncrated that day? A. That is right.

Q. And it was subsequent to that day you lent it to Mr. Smith? A. That is right.

Q. What did he want it for, did he say?

A. I don't know how it came up. I may have had the idea myself or he may have had but there was a very strongly constructed box, well adapted for use as a tool box, and I either suggested that he use it if he wanted it or he asked me, I can't recall which it was.

Q. And then after you lent it to him what did he do with it?

A. It was moved over to the property next door.

Q. Moved over the property next door?

A. Yes, sir.

Mr. Butcher: That is all.

Cross-Examination

By Mr. Grigsby:

Q. You state, Major, that you arrived here the night of April 30, 1948? [67] A. Yes, sir.

Q. And you had been outside on an emergency trip? A. Yes, sir.

Q. You and your wife? A. Yes, sir.

Q. On account of the sickness of one of your relatives?

A. My wife's father passed away on April 5th.

Q. And you arrived out at Fort Richardson about eleven o'clock the night of April 30th?

(Testimony of Raymond A. Seifert.)

A. Yes, sir.

Q. And you registered in out there, didn't you?

A. Yes, sir.

Q. And you looked that up to see that that was the correct date?

A. Yes, sir, I checked it today.

Q. And that was the date you arrived out there and checked in?

A. I checked in on the 30th of April, 1948. I did not show the time as I should have done. I should have shown the hour at which I reported but I noted that I did not show it.

Q. And then you had lived in this place before that then, before you took this trip?

A. Right, sir.

Q. And you went from there to the house and occupied it the [68] rest of that night?

A. That is right, sir.

Q. And the next day?

(No response.)

Q. And at that time your household goods which you have spoken about were at the Fort, were they?

A. Yes, sir.

Q. Several days after that did the officials out at the Fort notify you that they didn't have room for those boxes?

A. Yes, sir.

Q. And on that account did you have them delivered to your place out here next to the Cutting residence?

A. They had 'phoned me several times at the

(Testimony of Raymond A. Seifert.)

office saying that I was just going to have to move my stuff because I needed the room and they did move it on May 6th.

Q. Were you there when it arrived?

A. I was not there when it arrived but my wife called and I went in right away.

Mr. Butcher: Your Honor, in Mr. Grigsby's questioning he continues to refer to this property as the "Cutting residence." There is no evidence that they ever resided there and made it their residence and I think it ought to be referred to in some way rather than the "Cutting residence."

Mr. Grigsby: The Cutting house, then.

Q. Now, then, were you there when those articles were receipted? A. Yes, sir. [69]

Q. And who receipted for them?

A. My wife, as I remember.

Q. Have you any way of knowing now that that was the 6th?

A. I checked with the—in Warehouse D at Fort Richardson they keep all the household goods and a number of people had been coming to see me at various times during the last week or so and questions have come up and I decided that I would go and check on these dates and I checked Friday and checked the record and that is how I know it was May 5th.

Q. Did you find the receipt that your wife signed? A. Yes, sir.

Q. And did you copy it?

(Testimony of Raymond A. Seifert.)

A. I copied it at that time and then I brought and I showed it to Mr. Bullerdick and today I went by and borrowed the file from the Post. I had the permission of the Executive Officer.

Q. Have you got the original receipt with you?

A. Yes, sir.

Q. May I see it. Do you know your wife's signature?

A. Yes, sir.

Q. Is that it?

A. Yes, sir.

Q. Did you see her write it?

A. I cannot recall whether I saw her write it but we checked [70] the boxes together and I called numbers and she checked them.

Q. Now, calling your attention to—I want to point out an item here, box 1, 1210 under Weight, do you know which box that was—what that box contained?

A. That by far the largest box. I would say that was probably the piano box.

Q. And that piano was uncrated that day, was it?

A. Yes, sir.

Q. Now was it several days after that before it was loaned to Smith?

A. Yes, sir.

Q. Are you able to state approximately what date it was moved over onto the Cutting property?

A. I couldn't state positively except the day I talked to Smith I believe was on a Saturday because I wasn't home other times.

Q. Have you looked it up? It would be Thursday that arrived, wouldn't it?

A. Yes, sir.

(Testimony of Raymond A. Seifert.)

Q. Was it the very next Saturday he moved it or Saturday or two afterwards?

A. I can't answer that question for sure. I don't believe I knew Mr. Smith at that time. I believe it was sometime before I finally got acquainted with him.

Q. The next Saturday would be the 8th and the following [71] Saturday would be the 15th. What is your best recollection as to the date the box was loaned to Smith and moved? It was one of those two Saturdays, was it not? You are home on Saturday, are you not?

A. I was at that time, yes, sir.

Q. And you were home the day that the piano box was borrowed? A. Yes, sir.

Q. And you were home both on the 8th and the 15th?

A. To the best of my recollection I was. I can't guarantee it because we are awfully busy at the Post at the time.

Q. Well, at least it wasn't moved over there until the 8th?

A. I know it wasn't moved then and I don't believe I knew Mr. Smith at that time.

Q. And your best judgment it was the following Saturday?

A. Yes, sir, because the way I got acquainted with Mr. Smith was getting water at my place and finally my wife started to give the men coffee. She would send a pot of coffee and it was sometime later before we finally got acquainted.

(Testimony of Raymond A. Seifert.)

Q. Do you know what Smith and the carpenters used that box for?

A. Used it as a tool box and that was the purpose for which I loaned it to them.

Q. Now what is your best recollection, Major, as to when you first saw any lumber out there such as you have described?

A. Well, as I said, there may have been some when I first came [72] there but I don't recall seeing any. But I believe there was some the first part of the next week. Things moved very swiftly there when they started.

Mr. Grigsby: If the Court please, I would like to offer in evidence for the Court's inspection this receipt dated May 6th, and it being an Army record we would like permission have it withdrawn.

The Court: Is there any objection?

Mr. Butcher: No objection and no objection to it being withdrawn.

The Court: Very well, it may be admitted in evidence.

Q. (By Mr. Grigsby): Do you have a copy with you?

A. No, sir, I believe Mr. Bullerdick has it.

Q. Did you make a copy of that when you first went out and inspect it?

A. Yes, sir, I made a copy last Friday.

The Court: It will be marked Plaintiff's Exhibit PP. We will simply mark the copy and not the original.

(Testimony of Raymond A. Seifert.)

The Witness: There is another record in there that you may be interested in. It gives the time this shipment was shipped from Seattle and shipped from Whittier. This is a War Department Shipping Document here with my furniture reference.

Q. (By Mr. Grigsby): What is the date of it?

A. Dated March 16, 1948. [73]

Q. And is that the one you alluded to?

A. Yes, sir, it says Household Goods. It is so identified, also the number of packages and the weight and the cubic area.

Q. Does that correspond to the list that is in evidence?

A. I would say that it does. Box No. 1 shows that it is 1210 pounds. The bill of lading number is referred to in here. I also checked in case anybody is interested that this man, Lloyd, the checker, is now Sergeant Arthur R. Lloyd who is now stationed at Maddigan General Hospital in Tacoma.

Q. He is the man your wife receipted to at the hospital—at the house? A. Yes, sir.

Mr. Grigsby: That is all I have.

The Court: Mr. Butcher, do you want to examine?

Mr. Butcher: Yes, your Honor.

Redirect Examination

By Mr. Butcher:

Q. Major Seifert, you stated in answer to a couple of my questions, I asked you one with regard

(Testimony of Raymond A. Seifert.)

to time and you say you were very hazy as to time?

A. Yes, sir.

Q. But you did know that this furniture did not arrive until the 6th? A. Yes, sir. [74]

Q. And you knew that and you have now established it and in answer to my next question you said you didn't know when the box was taken over there but it was subsequent to that date?

A. Yes, sir.

Q. Now in answer to Mr. Grigsby's question you say it could have been the 8th or the following Saturday? A. Yes, sir.

Q. Do you actually know of your own knowledge when it was? A. No, sir.

Q. You do not?

A. I am not sure enough to say which Saturday it was.

Q. It could have been any day after it was uncrated?

A. Any day except that I feel I didn't—I don't feel like I knew Mr. Smith until sometime after I came back, to the best of my recollection and that is why I said it was probably a week from the Saturday afterwards.

Q. You came back on the 30th?

A. I came on the Post about eleven and when I got to Anchorage it was May 1st, very early in the morning.

Q. And by the 6th you could have made Mr. Smith's acquaintance could you not?

(Testimony of Raymond A. Seifert.)

A. I could have but I don't believe that I did.

Q. But you don't know when you did make it?

A. I don't believe that I did because I felt quite confident I wasn't home at all during the week except the day when the [75] furniture was unloaded.

Q. But if you said it was a week later or two weeks later it would be just a guess?

A. A guess, I might say, supported by other things which I feel linked to it.

Q. On the other hand you didn't make Smith's acquaintance until sometime after you returned home?

A. Yes, sir.

Q. You returned home on the 5th of May?

(No response.)

Q. Now your recollection about the lumber, you stated in answer to Mr. Grigsby's question, you state the lumber could have been there but it was your best recollection that it was delivered sometime later?

A. That is right, sir.

Q. Could that have been delivered after the 6th or around the 6th?

A. The lumber?

Q. Yes.

A. The lumber was there on May 6th because my wife remarked that some of the men had been sitting on the lumber watching them unload while the men were unloading.

Q. Some of the workmen?

A. That is right, sir.

Q. Now, you had occasion, I believe, I believe

(Testimony of Raymond A. Seifert.)

you said, to [76] engage Mr. Smith as a contractor to construct your own addition? A. Yes, sir.

Q. And you then engaged him as an independent contractor, did you, for a flat price?

A. It was not a flat price, I am sorry to say.

Q. What do you mean by that?

A. Well, time that I spoke to Mr. Smith about it, I asked him how much it would take to put a roof and a door—well, the door was in—well, the roof over a greenhouse which I had which was very well built adjoining my house. It was already connected by a doorway to the kitchen. And I asked him how much he wanted to erect the roof over it and floor it. He told me \$235 and I told him to go ahead. If it was in the neighborhood of that it was all right with me. A few days later he told me that he had miscalculated and it would be up around \$400 and some dollars. And, finally, when he completed the work which involved other work, they knocked the top out of a closet in my house and put a very rough stairway leading from the opening to the closet up to the attic and they put in two windows upstairs and they also erected a fence for me. I had the pickets already all cut and sawed and ready to nail up. They did that.

Q. What is the total price?

Mr. Grigsby: We object to that; it is immaterial for the Court, please.

The Court: Objection sustained.

Mr. Kay: I object to the whole course of this examination, it being improper.

(Testimony of Raymond A. Seifert.)

The Court: Counsel didn't object in time.

Mr. Kay: Any further——

Mr. Butcher: ——that the work was not satisfactory and the price was higher than that agreed upon and it is highly relevant if the contractor is engaged in similar practices and dealings with other people with whom he deals.

The Court: If that were true you could follow back Mr. Smith's course of business for the course of ten years and prove he never did do a good job in that event. The objection is sustained.

Mr. Butcher: May I have an exception.

Q. When the fence was built, Mr. Seifert, was it built along the line of property as you had formerly identified it? A. Yes, sir.

Q. Along the same line? A. Yes, sir.

Q. Between the stakes?

A. Yes, sir, I was quite concerned with it and checked it myself.

The Court: Any further cross-examination?

Recross-Examination

By Mr. Kay: [78]

Q. Major, I believe you testified that the piano box was probably box No 1 because of the weight of that box? A. Yes, sir.

Q. You are certain, are you not, that the piano box was included in those boxes?

A. I know it was.

(Testimony of Raymond A. Seifert.)

Q. And that it definitely arrived on your property on May 6th? A. That is right, sir.

Q. And prior to that time was in the warehouse at Fort Richardson? A. Yes, sir.

Q. Then it could not have been on your property on May 1st? A. That is right.

Q. Were you home on the evening of May 1st, do you recall, that was the evening after you drove in? A. Yes, I was home.

Q. Anytime during that evening did you observe Mrs. Cutting on the premises next door with a tack hammer in hand tacking up notices?

A. No, sir.

Q. Did you observe her at any time during that evening?

Mr. Butcher: Your Honor, I object to that line of testimony. The man has testified what he knows about it.

The Court: Objection is overruled. [79]

Q. (By Mr. Kay): You may continue, Major, did you see Mrs. Cutting at any time on the evening of May 1st? A. I cannot recall, sir.

Q. If you had seen her do you believe you would have recalled? A. No, sir.

Q. Major, did you ever have occasion to look over the Cutting house as it was being built?

A. Well, it was being built right next door and we are very close together. I have a picture of how close we are together here. I would say only about 10 feet apart.

(Testimony of Raymond A. Seifert.)

The Court: How far apart?

The Witness: 10 or 12 feet, sir.

The Court: Between your house and Mrs. Cuttings.

Q. (By Mr. Butcher): Who took the picture, Major?

A. I imagine I did. It was taken by my camera either myself or my wife took it.

Mr. Kay: I wonder if Mr. Butcher would object to admitting one of these pictures in evidence? Would you be willing to have it?

The Witness: If either one of them wants it I am glad to turn it over, if not, I will take it home.

Mr. Butcher: Will counsel state for what—what his purpose is in having it produced?

Mr. Kay: Just to show the Court the approximate— [80]

Mr. Butcher: Objection: It hasn't been properly identified.

Mr. Kay: I won't make any point of it, your Honor, it would be impossible to properly lay a foundation. It would be difficult to lay a foundation because the Major does not know who took the picture.

The Court: You withdraw the offer?

Mr. Kay: Yes, I withdraw the offer.

The Court: Offer withdrawn.

Q. (By Mr. Kay): Major, during the time that you were living there that the Cutting house was under construction, did you at any time see Mrs. Cutting tacking up notices?

(Testimony of Raymond A. Seifert.)

Mr. Butcher: I object. It is repetitious, having already been answered.

The Court: Overruled.

A. No, sir.

Mr. Kay: Thank you, Major.

Mr. Butcher: What was the answer?

The Witness: No, sir.

The Court: Any other counsel care to examine?

(No response.)

The Court: That is all, Major, you may step down and if you wait a few minutes we will give you back your book.

(Witness excused.)

The Court: Another witness may be called. [81]

Mr. Butcher: I would like to request the Court to recall Mrs. Cutting.

The Court: Very well, Mrs. Cutting may be recalled.

AUDREY CUTTING

called as a witness herein, being previously duly sworn, resumed the stand and testified as follows:

Further Redirect Examination

By Mr. Butcher:

Q. Mrs. Cutting, you have heard the Major testify in connection with the so-called piano box which was apparently sometime located on your property, do you have any further information in

(Testimony of Audrey Cutting.)

connection with the posting of these notices and the various lumber piles and the box which you could tell the Court about?

A. Well, no, I don't have any further information. The only thing that I will say, that everyone has hopped onto this piano box as being the one where the tools were stored, when that place was first built there was a box and I described it in Court and everyone has leaped on it because it was supposed to be in the size and the shape of a piano box, and I told them it wasn't the big piano box I had put the notice on but it was half the size of the desk Mrs. Annabel has and it come up to me about here.

Q. That is about to your chest?

A. Major Heifert's piano is an upright piano and it is almost as tall as I am if I take my shoes off.

Q. How do you know that?

A. I was in Mr. Seifert's room the other day and I had occasion to look at it very closely. Now that box they first had on there was not a large piano box. I am a musician and this was not a large piano box.

Q. I believe in answer to Mr. Davis' question a couple of days ago you said it was like a piano box?

A. That is correct, it was in that shape because I couldn't draw, I don't draw.

Q. Have you at any time said it was a piano box?

A. No.

(Testimony of Audrey Cutting.)

Q. And to you it was what?

A. It was just a box, a tool box with a slanting cover on it.

Q. And it was that box in which you posted the notice?

A. Yes, sir. And that was on my property because I made reference to it now when talking to the surveyor of the property to follow the line between Major Seifert's house and my house and that tool box and the lumber piles were on my side and they weren't large lumber piles, they were small lumber piles.

Q. I believe in answer also to certain questions about that box that Mr. Davis asked you several days ago, you have positively stated that it was on the first day of May and then when I asked you about it again you were not as confident——[83]

Mr. Kay: I object to the form of that question, your Honor.

The Court: Counsel is virtually testifying or making an argument not asking a question.

Mr. Butcher: I am refreshing the witness——

The Court: You can put it in the form of questions.

Q. (By Mr. Butcher): Tell us about the certainty of the posting of the notices in your own words without any questions at all. Just tell us what happened in connection with the posting of the notices?

A. On May 1st, that was the first day that my

(Testimony of Audrey Cutting.)

secretary went to work, and I instructed her to type up the lien notices. There were four notices, and I posted three that evening on the property.

Q. You are sure?

A. That is to the best of my recollection.

Q. Can you say or go back and say anything at all that would identify it at May 1st other than your recollection? A. No, sir.

Q. How long ago is that? Is that about nine months ago?

Mr. Grigsby: We object to any argument.

The Court: Objection sustained; the Court can figure out how many months ago it was.

Q. (By Mr. Butcher): I believe you previously answered this, you said when the cement floor was poured and the first floor put on the building [84] that you posted the last notice? A. Yes, sir.

Q. Did anyone at any time ever in connection with this case ever discuss those notices with you?

A. No one but Mr. McCutcheon.

Q. Well, he isn't party to this. That is all.

The Court: Any further cross-examination?

Further Cross-Examination

By Mr. Grigsby:

Q. What discussion did Mr. McCutcheon have with you about it?

A. He asked me to post the lien notices as fast as possible.

(Testimony of Audrey Cutting.)

Q. And that is why you did it after signing the contract?

A. That is right. And the following Monday Mr. McCutcheon questioned these and I saw him on the street and he asked me "Did you post those notices?" and I said "Yes."

Q. What day was April 30th—Friday?

A. Friday.

Q. And you posted them Saturday?

A. Yes, sir.

Q. And you told him when you had posted them?

A. Yes, sir.

Q. And you posted the first one on a tool box?

A. I wouldn't say the first one.

Q. But you did say that the other day? [85]

A. No, I said I had three notices and I posted two on two lumber piles and one on the tool chest, as to which one was first I don't remember.

Q. But all the same evening? A. Yes.

Q. And you would go out there and find that they had been falling off and you re-posted them?

A. Yes, sir.

Q. And you posted it on this tool box?

A. Yes, sir.

Q. And you know you posted it on the tool box the first time on the night of May 1st in the evening?

A. Yes, sir.

Q. And you went out in the evening because you didn't want to disturb the carpenters at work?

A. Not only that but because it was the only time I had free.

(Testimony of Audrey Cutting.)

Q. But you did say the other day you went out there in the evening because you didn't want to disturb the carpenters at work? A. That is right.

Q. (By Mr. Kay): Mrs. Cutting, the other day you said these lumber—today you say these were not large but small lumber piles?

A. That was the other day. I didn't give any impression that they were large lumber piles. [86]

Q. In response to questioning by Mr. Davis you are sure you didn't describe the type of lumber that was in those piles? A. No, I didn't.

Q. As a matter of fact didn't you say they were composed of two by fours and ship-lathe?

A. I don't believe—

If the reporter shows it is, are you mistaken now or are you mistaken then?

A. I don't recall any shiplathe being there.

Q. You deny that you said the other day that one lumber pile was composed of shiplathe?

A. I think you are referring to testimony that we were speaking of further along when the larger lumber piles were there.

Q. How big were these lumber piles?

A. They weren't very big.

Q. How big were they—knee high?

Mr. Butcher: Your Honor, I object to this testimony. Mr. Kay has interrogated this witness?

The Court: Counsel opened the thing up by further interrogation. After counsel for the defendant has asked questions it is not in order to forbid

(Testimony of Audrey Cutting.)

the counsel for plaintiffs to cross-examine on the very subject testified to by the witness upon direct examination of counsel. The objection is overruled.

Mr. Butcher: Then I further object, your Honor, on the [87] grounds that I was not given an opportunity in between the questions of Mr. Grigsby and Mr. Kay and I think the rule was the other day—

The Court: All right, go ahead and examine the witness. Mr. Kay will be seated.

Mr. Butcher: It is too late in these proceedings. I will withdraw it.

The Court: Go ahead, Mr. Kay.

Q. (By Mr. Kay): Well, how big were these lumber piles—knee high?

A. I don't remember that, Mr. Kay.

Q. You can't remember that?

A. I know they weren't big lumber piles.

Q. What is your idea of a big lumber pile?

A. Big lumber pile is a pile—well, it is a big lumber pile, period.

Q. You can't give the Court any idea whatever about how big you consider a big lumber pile?

A. Just depends on the job.

Q. You mean that your idea of a big lumber pile depends on the job?

Mr. Butcher: Your Honor, I object to any further questions. She is not a materials man, a lumber man. What is big in her mind might not be a big pile in a lumberman's.

The Court: She used the word "big." [88]

(Testimony of Audrey Cutting.)

The Court: Overruled. What do you mean by "big"?

The Witness: Just piles and piles of big lumber piles.

Q. (By Mr. Kay): How big is a little lumber pile, a small lumber pile?

A. Well, it wasn't a very big pile. It was there on the side.

Q. Two? A. Two, yes.

Q. Were they ankle high would you say—about that high?

A. In between your ankle and knee, yes.

Q. Yes, sir, somewhere between the ankle and a knee of a middle-tall man, you said, mine?

A. No, I said mine.

The Court: Any further direct examination?

Mr. Butcher: No, your Honor.

Q. (By Mr. McCarrey): Mrs. Cutting, I believe you testified that you placed this notice upon one of the lumber piles or upon the boxes, is that correct, or a notice similar to that?

A. Notice similar to that.

Q. Now, coming back to the size of this lumber pile, I would like to inquire whether or not the lumber pile was sufficient to have this stand up or was it laying partially on the ground?

A. It was laying on top of it.

Q. You laid it on top of it?

A. Yes, laying on top. [89]

Mr. McCarrey: That is all.

(Testimony of Audrey Cutting.)

Mr. Kay: In view of that question——

Mr. Butcher: I object to that.

The Court: Go ahead.

Q. (By Mr. Kay): Mrs. Cutting, I asked you specifically where you tacked that onto the lumber pile and you said “The end of the lumber.”

A. I wouldn't be sure what I testified to.

Q. And I don't believe you do either.

Mr. Butcher: Your Honor——

The Court: The comment of counsel is out of order. It will be stricken.

Mr. Kay: Sorry, your Honor.

Q. (By Mr. Grigsby): Did you bring that real estate book with you? A. Yes, sir.

Q. Do you have it with you now?

A. Yes, sir.

Q. Will you produce it? Will you turn to the form you alluded to? And this is the form that you had been familiar with since you went into the real estate business? A. Yes, that is one of them.

Q. This is the one you alluded to in your testimony? A. Yes.

Q. That you had been familiar with and Mr. McCutcheon had [90] advised you to get out there immediately and get this notice posted so you drew it up in this form?

A. Approximately, with some changes.

Mr. Grigsby: We offer the form in evidence.

The Court: Is there any objection?

Mr. Butcher: No objection.

(Testimony of Audrey Cutting.)

Mr. Grigsby: It will be noted, if the counsel will agree, to be form No. 2504 entitled Notice that Owner will not be Responsible for Improvements of Cowdery's Legal Form No. 918.

The Court: What is the number of the form?

Mr. Grigsby: 2504, Cowdery's Legal Forms.

The Court: I am informed by the Clerk that the certified copy of Plaintiff's Exhibit PP has been made and certified to. Therefore the original may be returned to Major Seifert. I assume that the counsel will have no objection to the substitution of a certified copy of marked Plaintiff's Exhibit QQ?

Mr. McCarrey: No objection, your Honor.

Mr. Grigsby: That is all.

Further Redirect Examination

By Mr. Butcher:

Q. Mrs. Cutting, this Form 2504, have you looked at this carefully? A. Yes, sir.

Q. And did you copy this form from the book or in what manner did you use this form to prepare the exhibit which you have [91] testified to posting on the property?

A. Well, I used part of it and part that would apply to the property.

Q. Was this form a satisfactory form for your purposes?

A. I didn't think it was, no. It wasn't quite clear enough to suit me.

Q. And you simply used this as a guide?

(Testimony of Audrey Cutting.)

A. That is right.

Q. And you made no attempt to copy it word for word? A. No, sir.

Q. And the form that was drawn was drawn by yourself using this form as a guide?

A. That is right.

Mr. Butcher: That is all.

The Court: That is all.

(Witness excused.)

Mr. Butcher: Defendant rests at this time.

The Court: The Court will stand in recess until fifteen minutes past three.

(10 minute recess.)

Mr. Butcher: Your Honor, I had rested my case. However, I would like to make a motion to permit the defendant to file an amended answer.

Mr. Grigsby: If your Honor pleases, that is rather indefinite.

The Court: I cannot rule upon the motion until I know what the proposed amended answer would embrace. That is not contained in the answer now on file?

Mr. Butcher: There is nothing additional contained, your Honor. The previous answer was filed and signed by myself in the absence of Mrs. Cutting who was outside and at the beginning of this trial I discovered one error in it and I corrected that by serving upon Mr. Grigsby a copy of the second answer in connection with his filing only.

In view of the development of the trial I have prepared a second amended answer which denies and admits everything which was denied and previously admitted by the previous answer and sets up affirmative defense the same grounds as previously set up and instead of showing that Sylvia Henderson was a minor, with the word "minor" only indicating her status, I set up a separate paragraph which identified her as a minor under 17 years of age and also that she caused to be posted notices upon the property, and that is the only change.

The Court: Counsel will send the proposed answer to the bench and give counsel for the other parties a copy so that they may see it, and we will be in better position to determine what is to be done.

Mr. Butcher: Your Honor, in the event argument is necessary, I am prepared to make argument on it. But I am submitting it now in connection with your Honor's request. I have copies for all counsel. [93]

The Court: Is there objection?

Mr. Grigsby: I have none.

The Court: Without objection the proposed amended answer of the defendants Audrey Cutting and Sylvia Henderson may be filed.

Mr. McCarrey: Your Honor, I would like to inquire of the Court—

The Court: Has counsel any objection?

Mr. McCarry: No, I have not, your Honor.

The Court: Very well, counsel may proceed.

Mr. McCarry: I would like to have the chance

to answer the affirmative defense set up in this.

The Court: All of the parties may reply to the affirmative defenses.

Mr. Grigsby: May it be deemed denied?

The Court: And if there is no objection all the affirmative defenses may be deemed denied. Have counsel for the defendants any objection?

Mr. Butcher: No, I am quite satisfied with that, your Honor. But I don't know, counsel aren't here who know nothing about this and who can't be spoken for.

Mr. Grigsby: That can be taken care of when they arrive, I suppose, your Honor?

The Court: When they arrive we can find out.

Mr. Grigsby: Mr. Bradley. [94]

Mr. Butcher: Your Honor, may I ask one further question about this denial? That denial goes to every part of the defense, is that correct?

Mr. Grigsby: We admit that Sylvia Henderson is a minor.

The Court: I think it would be better to file written replies. Counsel may have 48 hours. The other parties may have 48 hours within which to file written replies to this amended answer.

K. D. BRADLEY

called as a witness herein, being first duly sworn, testified as follows:

Direct Examination

By Mr. Grigsby:

Q. State your name, please.

A. K. D. Bradley.

Q. Where do you live, Mr. Bradley?

A. At the present time I am living at 423 Ninth Avenue.

Q. And where did you live last May and June?

A. Same place.

Q. Do you know Russell Smith? A. I do.

Q. And where was he living at that time?

A. With me.

Q. And did you have occasion to observe the construction of the residence building on the premises in controversy here? [95] A. I did.

Q. Being what is known as the house built by Audrey Cutting?

Mr. Butcher: He should wait to answer until the full question is stated. I don't know whether the answer makes sense if he answers in the middle of it.

Q. (By Mr. Grigsby): I am referring to lot 2 in block 37 D, South Addition?

A. I don't know the place by lot and block number excepting seeing some of the papers that were served, but I suppose it was the same place. It was the one he built for Audrey Cutting.

(Testimony of K. D. Bradley.)

Q. The Smith Building, and did you observe that construction from the beginning? A. I did.

Q. And did you have a special interest in that construction? A. I did.

Q. Now did you make notes of any of the dates that various things occurred out there in the course of that construction? A. Yes, I did.

Q. Now did you make notes of any of the dates that various things occurred out there in the course of that construction? A. Yes, I did.

Q. Have you that with you?

A. I have some of the notes that I had taken at that time.

Q. Now did you make a note of when that construction started? A. Yes, sir.

Q. Refreshing your memory from your book there, can you state when that construction started referring to the excavation?

A. The excavation started April 26th according to my notes then. [96]

Q. Did you make the entry on the day it started?

A. Yes, sir.

Q. And have you an entry there of the date the first lumber arrived there?

A. First load of lumber, May 3rd.

Q. Were you in the vicinity when it arrived? Did you see it arrive? A. Yes.

Q. And made the note on that day? A. Yes.

Q. Now when was the first carpenter work done there?

(Testimony of K. D. Bradley.)

A. I couldn't say for sure without getting some other records but the forms for the concrete was built between the third and the fifth. How I know that is the concrete was poured on May the fifth for the floor of the building.

Q. Now at that time was there any post or pillar erected in the basement?

A. No, there would be no post or pillars in the basement because the concrete floor hadn't been poured yet.

Q. When they did put the post or pillar in the basement they had to rest on the concrete?

A. Right.

Q. Do you know what rate those posts were erected?

A. I couldn't say that. I can tell you when the first blocks of the log were laid.

Q. When was that? A. On May 6th.

Q. At that time were the posts or pillars placed in position? A. No.

Q. The floor hadn't been completed yet?

A. No, the building hadn't been. The walls of the basement hadn't been completed yet.

Q. Now do you know of Mr. Seifert who lives next door to these premises?

A. I can't well say I am well acquainted with him. I know the man when I see him.

Q. You know his place? A. Yes.

Q. Do you know anything about a box big enough to contain a piano which was used as a tool box during the course of this construction?

(Testimony of K. D. Bradley.)

A. I know of a box that was used as a tool box that was secured from Mr. Seifert.

Q. And do you know when that was secured from Mr. Seifert from your notes?

A. Not on my notes.

Q. Do you have any other way of knowing it?

A. Well, I know it was after May the 6th.

Q. And how do you know it was after May 6th?

A. The van that carried Major Seifert's material bringing it out to his place stopped in the way of unloading some blocks and we asked them to move and they pulled around into the alley and backed in and unloaded furniture boxes from his place on May 6th.

Q. Then you have an item in your book to that effect?

A. That that was the day that they started laying the blocks and that is when we got the second loads of blocks which the van was in the way of unloading.

Q. And you have the date of the second load of blocks? Do you know how long after that that piano box was brought over and used as a tool box?

A. I couldn't say, a number of days.

Q. That is as close as you state? Were you over on the premises and watched the construction frequently?

A. I was there from the first of the excavation until the final windup of the painting and the finish of the job.

(Testimony of K. D. Bradley.)

Q. Did you ever see any notices posted there to the effect that Audrey Cutting or Sylvia Henderson or anybody else wouldn't be responsible for any lien claims?

Mr. Butcher: Your Honor, I object to the question as leading.

The Court: Objection overruled.

(Question read.)

A. I don't remember seeing any such notices.

Q. (By Mr. Grigsby): If you had would you remember it? A. I believe I would.

Q. Did you ever see any such notice on that tool box? A. I don't believe I ever did.

Q. Don't you know?

A. I believe I would have noticed it if it had been there because I have been in the construction game a long time.

Q. You haven't any recollection of any such notice being seen at any time? A. No.

Q. And you were out there every day during construction?

A. I don't believe I missed a day.

Mr. Grigby: That is all.

The Court: Counsel for defendant. Do you prefer to have counsel for the intervenor question first?

Mr. Butcher: I will talk to Mr. Stringer just a moment. I will yield to Mr. Stringer at this time.

Q. (By Mr. Stringer): Mr. Bradley, are you

(Testimony of K. D. Bradley.)

familiar with the terms of the contract—the independent contractors agreement between Smith and Mrs. Cutting that has been identified here as trustee in intervention No. 1?

A. I read them over sometime about the middle of May, I believe, wait a minute, yes, the middle of May. [100]

Q. You read the contract over? A. Yes.

Q. You testified in response to Mr. Grigsby's question you were there all during the course of the construction up until the house was finished, up until the day?

A. I don't believe I missed a day.

Q. Was the house completed when it was turned over to Mrs. Cutting?

A. I believe that the only thing that was done after it was turned over to Mrs. Cutting, we got a pretty heavy rain and some of the backfill along the outside wall had sunken from the cause of that rain and I believe Mr. Smith went back after—Mr. Smith and myself went back after the keys were turned over and filled in where that ground had shrunken away.

Q. Were the doors and the windows and closets and the cabinet work done in accordance with the terms of the contract?

Mr. Butcher: I object to this question, Your Honor, the witness has testified while he read the contract he simply remembered it. He is not there as an inspector and he can only say whether he

(Testimony of K. D. Bradley.)

thinks the building was finished or not and not in accordance with all the terms of the contract. The question is leading, besides that.

The Court: The objections are overruled.

A. I wouldn't say positively that is in the contract as to what number of doors, windows, cabinet work and so on and so [101] forth is in that contract or what it is.

Q. (By Mr. Stringer): Were the doors and windows installed and the closets installed and the cabinet work finished? Was all that done in accordance with good building practice?

Mr. Butcher: I object to that, Your Honor, this man is not a building inspector and is not qualified as such; at least he has not so testified to such.

Mr. Stringer: I will qualify him, your Honor.

Q. How long have you been in the building trade?

A. I got my first journeyman card as an electrician in 1907.

Q. Have you followed the building and construction trade continuously?

A. I would say I followed it better than fifty per cent of the time since that date.

Q. Then you know a construction job when you see one? A. I believe I do.

Q. Was this work done in accordance with good building practice? A. I believe it was.

The Court: Is there an objection?

Mr. Butcher: There was objection.

(Testimony of K. D. Bradley.)

The Court: The witness has not shown himself qualified except as an electrician. I have yet to hear any testimony that he is especially familiar with carpenter work or construction work except as it involves electrical installation and [102] therefore the objection is sustained.

Q. (By Mr. Kay): Mr. Bradley, I believe you testified that the first lumber arrived on May 3rd—first load of lumber—May 3rd? Now, to the best of your knowledge was there any other lumber piled on that lot prior to May 3rd?

A. Not to my knowledge.

Q. You were out there every day during that time?

A. I was there, I believe, every day from the time Bert Angee moved his shovel over there.

Q. And you don't remember any lumber piled up there over there? A. I don't.

Q. Do you know what the men used to keep their tools in prior to the time they borrowed the box from Major Seifert? A. Yes, I do.

Q. Would you describe it, please?

A. I had a plywood box made for my little Ford pickup. Its dimensions were 36 inches long, 24 inches wide, and 18 inches deep.

Q. That is 18 inches high?

A. That is right. And it was painted green.

Q. And is that the box that the men used to keep their tools?

A. That box was used for the electrical cords,

(Testimony of K. D. Bradley.)

extension cords, [103] and the saws and stuff that is owned by Mr. Smith.

Q. Other than that box and the box which they later borrowed from Mr. Seifert, do you know of any other box that was used as a tool box on this job?

A. Only the men's personal tool boxes.

Q. What size would those be?

A. I would say they would probably be 36 inches long and maybe 10 inches wide, 8 or 9 inches deep.

Q. This box—this green plywood box that they borrowed from you that they kept their tools in until they borrowed the box from Major Seifert was no more than 18 inches high?

A. That is right.

Q. By its biggest dimensions how large was that?

A. 36 inches long.

The Court: Any other counsel——?

Q. (By Mr. McCarrey): Mr. Bradley, I would like to inquire as to what kind of lumber was delivered on the 3rd as to which you referred?

A. Dimensions of shiplathe.

Q. Was that in one or more piles?

A. The first load was dumped in one pile.

Q. Do you recall how big a pile that was by dimension?

A. Well, it was the width of a lumber truck and I would say approximately two and one-half or three-feet high.

The Court: Counsel for defendant may examine [104]

(Testimony of K. D. Bradley.)

Cross-Examination

By Mr. Butcher:

Q. Now Mr. Bradley, I believe you testified you had this book in your possession during the entire construction of the Cutting House?

A. Yes.

Q. And is it your practice to carry a book like this around on these jobs?

A. That question again?

Q. Is it your practice to carry a little book in which to make notes around on these jobs?

A. I generally carry a note book in my pocket at all times.

Q. I believe you run a grocery store, do you not, Mr. Bradley? A. Sir?

Q. Do you run a grocery store?

A. Not now.

Q. You were in the grocery business?

A. Up until February 12th.

Q. February 12th?

A. 1947, I believe it was.

Q. 1947? You haven't been in the grocery business since then? A. No.

Q. What business have you been in?

A. When I came back to Alaska, back to Anchorage a year ago, a year ago this spring I took out a real estate dealer's license. [105]

Q. You have been engaged in buying and selling real estate since that time?

(Testimony of K. D. Bradley.)

A. I have sold some.

Q. I believe you testified you had an interest in this construction on the so-called Cutting property, what was that interest?

A. I was on a deal—a real estate deal—at that time to construct five houses similar to those plans that that house was built on for some Army officers and I was keeping a very close touch with the building to find out the number of days, hours and cost of material that went into that building. And the contractors of the City here, most of them, said it would take from 45 to 60 days to construct the building, and Mr. Smith said he construct it under 45 days and gave an estimate of 35 days.

Q. Mr. Smith is your son-in-law or was your son-in-law, is that correct? A. Right.

Q. And you have known Mr. Smith for quite some time? A. Yes.

Q. Did you have a financial interest in this contract? A. I do not.

Q. Were you a bondsman on the property?

A. I was.

Q. Who was bondsman with you? [106]

A. I believe Audrey Cutting was the other bondsman at that time.

Q. Where do you maintain your real estate office? A. In my house.

Q. And your house is located where?

A. 423 Ninth Avenue.

Q. 423 Ninth Avenue—is that near this property that was under construction?

(Testimony of K. D. Bradley.)

A. 12 or 14 blocks.

Q. Do you have a car? A. I do.

Q. You had a car last summer?

(No response.)

Q. And you need a car in your business?

A. Yes.

Q. What time do you usually open your office in the mornings?

A. Well, during the time of that construction I generally went over there to the building the first thing in the morning.

Q. The first thing in the morning, what time would that be—when the carpenters arrive?

A. Between 8 and 8:30.

Q. How long would you stay there?

A. Some days I stayed there until noon.

Q. You stayed there until noon just watching?

A. Just watching. [107]

Q. You weren't working yourself?

A. I did help move some lumber and some concrete blocks.

Q. Were you paid for that? You didn't file a lien for that?

A. At that time I was convalescing from a very serious operation and I was doing it to get my health back and strength.

Q. Were you there in the afternoon?

A. Most of the days I was there part of the afternoon.

Q. So that most of the days you were there in

(Testimony of K. D. Bradley.)

the morning until noon and most of the days you were there all afternoon?

A. I wouldn't say all afternoon—sometime during the afternoon.

Q. Were you there the day the men were sitting on the lumber pile watching the unloading of his furniture?

A. I don't ever remember of anything like that happening.

Q. You were there, I believe you testified, when the furniture was unloaded next door?

A. The crating boxes, I wouldn't say when they unpacked the furniture but I would say when the crating arrived.

Q. That is how you knew about this piano box?

A. That is right.

Q. And were you watching the unloading—the unpacking?

A. Maybe everybody might have stopped for five minutes to watch that big trailer backed into there because it was a very artistic job. [108]

Q. Now you testified that the lumber came about three times—one load or two loads about the third day of May—your book——

A. First load of lumber May 3rd.

Q. And what was your purpose in making that notation?

A. The time element used in construction of the building.

Q. And when did the second load arrive?

(Testimony of K. D. Bradley.)

A. I don't believe I have the second marked down here.

Q. Were you aware at that time that notices of non-responsibility should have been posted on that property?

Mr. Brigsby: Object to as assuming something not in evidence.

The Court: Objection sustained.

Q. (By Mr. Butcher): You are familiar with notices of non-responsibility, are you?

A. I am.

Q. You have posted them yourself on other jobs?

A. I believe I have posted those notices once.

Q. Do you recall the job?

A. I believe it was the time that I built my house down at 10th and E—G Streets.

Q. Who built that house?

Mr. Kay: I object, Your Honor, as being immaterial.

The Court: Does counsel wish to be heard on that?

Mr. Butcher: If it is necessary, Your Honor. This man [109] has testified that he did not see notices of non-responsibility. In order to determine whether he had ever seen one or not he would have to know what one looked like and I am inquiring if he knows what a notice of non-responsibility looks like so that he could identify it if he saw it.

(Testimony of K. D. Bradley.)

The Court: Objection is overruled. You may answer.

Q. (By Mr. Butcher): Who built that house?

A. I built it up to the finish work.

Q. You built it and you posted notices of non-responsibility for your own construction, did you?

A. On the finish work. The bank held the mortgage on the property and I posted those notices to hold.

Q. You posted the notices for the bank, then?

A. Sir?

Q. You posted the notices for the bank?

A. I posted the notices for the protection of the bank.

Q. That is the only time you were called to ever post them then? A. I believe that is right.

Q. Have you ever had occasion to examine one then on any other property?

A. I don't believe I have.

Q. Have you seen any signs on this property called Notices of Lien?

A. I don't believe I was down to the property again after it [110] was finished.

Q. Before it was finished did you ever see any lien notices up called Notices of Lien?

A. I don't believe I did.

Q. You didn't see anything like that?

(No response.)

Q. Does your little book show the date it was finished?

(Testimony of K. D. Bradley.)

A. The last work on the house was 6-16.

Q. That would be the 16th day of June?

A. I believe that is right.

Q. Was that the last carpenter work or the last of any kind of work?

A. I believe that was the day that the painters finished. I beg your pardon, I believe that was the day that the last carpenter work was done on it.

Q. It was painting done after that?

A. I believe there was some painting where the carpenters finished up.

Q. Does your little book show the date the painting was finished? A. No, it didn't.

Q. The purpose of keeping this book was to calculate the time, I believe you testified?

A. That is right.

Q. And can you calculate the time from that book from the [111] beginning to the end?

A. Total hours for the job for carpenters?

Q. No, from the date the job began which you have noted there in your book until the day the last work was done, will your book show that?

A. It shows the total.

Q. Does it show the last day the work was done? A. Yes.

Q. The last day the painting was done?

A. No.

Q. Then your book doesn't show the total job?

A. The painting was done on contract so I could get the figures on that very easy.

(Testimony of K. D. Bradley.)

Q. You could get them now but your purpose, I believe you testified, in keeping this book was that you could check if Mr. Smith could make it in the time he stated he would so you noticed the delivery of the lumber so that you could calculate the entire time of the job. But you didn't note the finish of the job, is that not correct?

A. There might be two days difference there.

Q. Where have you kept this little book during the period of time from the date that appears therein until now?

A. Up until last fall when I quit advertising and selling any real estate I carried it in my pocket. Since that time it has been in a folder that I have to keep all real estate materials [112] in it in my house.

Q. Do you have any other books like that on the job? Is that the only book you have?

A. No, I have others.

Q. But not on this job?

A. Not on this job.

Q. Were you interested in the Seifert job?

A. No.

Q. You didn't keep any book on that job?

A. No.

Q. Does your book show the date the cinder blocks arrived?

A. The first load of blocks was May 5th.

Q. Were there other loads? A. Yes.

Q. Does your book indicate the dates of those other loads? A. No.

(Testimony of K. D. Bradley.)

Q. It does not? Does your book indicate the dates that electrical materials were delivered?

A. No.

Q. It does not? Does your book indicate the date the shingles were delivered for the roof?

A. No.

Q. It does not. Did your book indicate the date the flooring was delivered? A. No. [113]

Q. Does your book indicate the delivery of any of the fixtures? A. No.

Q. Was there a stove and refrigerator put in the house?

A. I don't know whether the furnishing of the house included a refrigerator or not.

Q. But your book doesn't show the delivery of any of those items? A. No.

Q. Nor the date of the painting? A. No.

Q. Nor the arrival of the painting material?

A. No.

Q. All your book does show is the arrival of the lumber, the arrival of the box from the property next door and the arrival of the cinder blocks, is that correct?

A. My book doesn't show the arrival of a box from next door.

Q. You were testifying that the box came over to the property for use as a tool box, you were not testifying from your book then when you testified to that?

A. I believe my statement was that I didn't know what date that box came over.

(Testimony of K. D. Bradley.)

Q. You had occasion recently to locate this little book in your files, did you? A. Yes.

Q. Did you discuss the book and the figures therein with Mr. [114] Grigsby at some previous time? A. Yes, I believe on two occasions.

Q. Two previous occasions in connection with this trial? A. Yes.

Q. Now, I believe your testimony in connection with your coming there in the morning and staying most of the day would have made it possible for you to be there when all these other things happened. You made no notation of those because you weren't interested in those items?

A. Only interested in the time and the cost.

Q. Do you know from your records the exact cost of the basement alone?

A. No, but I can get it.

Q. But that book won't show it? A. No.

Q. Will it show any feature of the house—cost of any feature of the house?

A. Yes, shows extra material and labor used in the basement for Mrs. Cutting for some apartments that she was going to have Mr. Smith finish off in the basement for her.

Q. Were they ever finished off?

A. They were never.

Q. Just discussion about it?

A. Just carried it through to making the necessary installations that would make it easy to do when she was ready for it. [115]

(Testimony of K. D. Bradley.)

Q. Were you present during any conversations between Mr. Smith and Mrs. Cutting?

A. I was.

Q. At her office or out on the property?

A. On the property in the basement.

Q. Now, Mr. Bradley, I believe you testified that you were not ever out at the house again after the carpenter work was finished?

A. I don't believe that I was ever in the building after the carpenters and painters left. I was out there at one time to help Smith move his tools.

Q. When did Smith move his tools, does your book show that?

A. I couldn't say what day it was.

Q. Was it after this painting was finished?

A. Yes.

Q. And the painting was finished sometime after the 16th of June?

(No response.)

Q. You testified the carpenter work was finished on the 16th and you didn't know when the painting finished? A. That is right.

Q. You were not present when Mr. Smith gave the keys to Mrs. Cutting?

A. I believe Mrs. Cutting came over to my house and got the key, if I remember right. [116]

Q. Did you make a notation of that?

(No response.)

Q. Did you make a notation of that and did she

(Testimony of K. D. Bradley.)

come over there at your request or Mr. Smith's upon assertion that the house was finished and read for delivery?

A. No, I believe she said when she came to the house she wanted a key to show it so some people.

Q. You figured from that—did you mean by that some real estate people that she was showing the house to for sale?

A. I don't believe—don't know whether it was for sale or not.

Redirect Examination

By Mr. Robison:

Q. You have testified, Mr. Bradley as to one tool box that was used on the job prior to the time the piano box came over and you said it was your own tool box and gave the dimensions. Were the upright dimensions of the box the same on both sides? Was it a rectangular box?

A. I think what would be considered the back side of the box was exactly the same height as the front. It might have been an inch difference.

Q. And did you see your tool box every day when you were out on the job? Did you see that box of yours?

A. If I claim the tool box. I think I paid to have it made and at the time I left Anchorage in February, 1947, I gave [117] it to Mr. Smith.

Q. Did you say it was his box, then? He owned the box during the time this job was done?

(Testimony of K. D. Bradley.)

A. That is right.

Mr. Robison: That is all.

Recross-Examination

By Mr. Butcher:

Q. Have you seen that box since?

A. Yes. I believe I can tell you where it is sitting right now.

Q. Where is it sitting?

A. On lot 9, block 3, the Saxton Subdivision.

Q. You are sure it is sitting there today?

A. It was before this big snow came. I don't know if they can find it now.

Q. You believe the depth of the snow is higher than the height of the box? A. I believe it is.

Q. During the time it was used on this job where was it sitting?

A. It was sitting at the east end of the work bench I would say about in line with the south side of the work bench on approximately 4 foot east of the work bench.

Q. And where was the work bench situated?

A. The work bench was sitting approximately, oh, it would be hard to say. I would say rough estimate as 40 feet from the [118] back of the lot and maybe 4 to 10 feet from Major Seifert's line.

Q. On the Cutting side?

A. On the Cutting side.

Q. Did you ever see this box standing on end?

A. I never did.

(Testimony of K. D. Bradley.)

Q. It could stand on its end?

A. Not open the doors.

Q. But with the doors closed it could stand on the end if someone sat it up there with the doors closed?

A. The doors were larger than the box to keep the water from dripping into the box.

It could still sit up on its end but you couldn't swing the door shut.

Q. But if it were closed and locked it could stand there forever, couldn't it?

A. Oh, sure.

Q. What kind of tools did Smith keep in it, do you know?

A. Well, he kept a Skill saw, quite a bit of extension cord, a sander, a little power drill.

Q. Shovel?

A. Short-handled shovel. Oh, just miscellaneous stuff like wrenches and one thing and another that you use around the place.

Q. Did he keep a pick in it? [119]

A. I don't believe he did. I wouldn't say for use.

Q. Are those all tools normally used on the job?

A. Well, short-handled shovel, hand-axe, wrecking bars and stuff like that are generally used on most jobs.

Q. Wrecking bars were in this tool box too?

A. That question again, please?

Q. This tool box contained wrecking bars as well as these other items?

(Testimony of K. D. Bradley.)

A. I wouldn't swear to it what tool was in that box.

Q. If there were all tools regularly used then sometime during the day the tool box would be empty, would it not?

A. The tool box would be what?

Q. Empty? A. It could be.

Mr. Butcher: That is all.

Further Redirect Examination

By Mr. Kay:

Q. Mr. Bradley, you said the top was bigger than the box? A. That is right.

Q. It means it had a ledge that stuck out around the box? A. That is right.

Q. If it stood up on end then it would tilt over to one side?

A. It would have to unless set on blocks.

Q. Did you ever see it at any time out there on the place in that position? [120]

A. I never did.

Q. Did you see a lien notice of any kind of a piece of paper of any kind tacked on that box at any time during construction?

A. I never did.

(Witness excused.)

The Court: Another witness may be called.

Mr. Kay: I would like to call Mr. Goudchaux.

HARRY GOUDCHAUX

called as a witness herein, being first duly sworn, testified as follows:

Direct Examination

By Mr. Kay:

Q. State your name, please?

A. Harry Goudchaux.

Q. Where do you live, Mr. Goudchaux?

A. 10th and C in Anchorage.

Q. And where are you employed?

A. Ketchikan Spruce Mills.

Q. How long have you been employed in Kechikan Spruce Mills?

A. Three and one-half years.

Q. Were you employed by Kechikan Spruce Mills during April, May and June, 1948?

A. I was.

Q. And what is your capacity at Ketchikan Spruce Mills? A. Bookkeeper. [121]

Q. In that capacity do you keep the books and records of that company? A. I do.

Q. Are you familiar with a job on which Ketchikan Spruce Mills supplied the materials known as the Cutting job? A. I am.

Q. And do you have any record—original record—Mr. Goudchaux, indicating the first date upon which lumber was supplied by you to the Cutting job?

A. I have our complete list of sales picture for the month of May.

(Testimony of Harry Goudchaux.)

Q. Would you refer to that month and tell me what day the first shipment went to the Cutting job? A. May 3rd.

Q. And what did that shipment consist of?

A. Two by eights, two by sixes, four by sixes, common spruce and shiplathe.

Q. What is the size of the shipment, can you assert?

A. It was about—a little over 3,200 feet of lumber.

Q. Go over that again and what other dimension lumber.

A. I can give it to you in detail, if you wish.

Q. Please do.

A. 90 pieces 2 by 12 foot; 64 2 by 6; 14; 64 2 by 6; 12.

The Court: What was the last one?

The Witness: 64 pieces 2 by 6, 12-foot long; one 4 by 6, 12-foot; 12 pieces of 1 by 8-foot shiplathe. Ten pieces 6 by [122] 12 foot common spruce.

Q. That is the load which was delivered on May 3rd?

A. That was the first load that went out to the Cutting job.

Q. Was there any more lumber delivered on May 3rd, do you know? Check there and see if there was a second shipment the same day?

A. 2,300 board feet of shiplathe.

Q. 2,300 feet of shiplathe? A. Yes.

Q. Made on May 3rd, too? A. Yes, sir.

(Testimony of Harry Goudchaux.)

Q. Two truckloads of lumber went out there on May 3rd?

A. Yes, sir.

Q. And they were receipted for?

A. Signed by Russell W. Smith.

Q. To whom were those billings made?

A. Audrey Cutting.

Q. Did you have occasion at any time after May third during construction of this house to send a bill to any one for the material supplied to the job by the Ketchikan Spruce Mills during the month of May.

A. All of our bills during the month of posting and about the end of the month usually the day before the last day or possibly the last day of the month, I make up the statements, put the copy of the original invoice which goes to the customer. They [123] are put in an envelope and taken to the post office.

Q. Did you place these original invoices in an envelope and address such an envelope in connection with this job?

A. I did.

Q. And to whom did you address that envelope?

A. That was addressed to Audrey Cutting.

Q. And did you place postage on that envelope?

A. Postage was placed on the envelope.

Q. And did you place it in the United States Mail?

A. It was placed in the United States Mails. At times we have some of them that are not properly addressed and come back to us but this one did not come back to us from the post office.

(Testimony of Harry Goudchaux.)

Q. You are certain of that?

A. I am certain of that.

The Court: Counsel for defendant may examine.

Mr. Butcher: Just a couple of questions, Harry.

Cross-Examination

By Mr. Butcher:

Q. You don't know if Russell Smith ordered lumber from any other lumber company, do you, from your own knowledge?

A. I understood that he did not.

Q. You understood that? In what way did you understand it?

A. From some of the workmen and his conversation.

Q. You don't know of your own knowledge, however, that he did not? [124]

A. Well, no, not to my own knowledge.

Q. Harry, did you ever bill Russell Smith for this lumber? A. No.

Q. You never ever billed him? A. No.

Q. Did you ever have any personal contact with Mrs. Cutting?

A. Lyle Anderson instructed me that was to be billed to Mrs. Cutting and we had discussed Russell Smith before that and it was agreed that nothing would be charged to him.

Q. And, according to your best recollection these bills were made up for the lumber delivered during

(Testimony of Harry Goudchaux.)

the month of May and sent out about the last of May and addressed to Mrs. Cutting?

A. That was about—either May 30th or 31st.

Q. And that called for payment at what date?

A. 10th of June.

Q. On or before the 10th day of June?

A. That is right.

Q. Were any materials ordered after the first of June? A. Yes.

Q. And when were those billed?

A. Those were billed in June in a statement mailed at the end of June.

Q. They were billed in June and the statement mailed to the same part at the end of June?

A. That is right. [125]

Q. And you never received those envelopes back?

A. No, sir.

Mr. Butcher: That is all.

The Court: Court will stand in recess until ten minutes past four.

(Short recess.)

The Court: The witness, Harry Goudchaux may resume the witness stand.

Mr. Butcher: I was through with him, Your Honor.

Mr. McCarrey: I was through with him.

(Witness excused.)

The Court: Very well, another witness may be called.

Mr. Grigsby: I would like to ask Mr. Bradley to resume the stand for a few questions.

K. D. BRADLEY

previously called as a witness herein, being previously sworn, resumed the stand and testified as follows:

Direct Examination

By Mr. Grigsby:

Q. Mr. Bradley, with reference to the tool box that you were testifying about and cross-examined about, the one you were asked about it being stood on end, in other words, the green box belonging to you, when was that taken to the Cutting property?

A. I am going to have to look it up. It was taken over the first day that the power was turned on and that was on May 7th. [126]

Q. Where was it taken from?

A. From where I live.

Q. And it arrived on the property on the 7th, the same day the power was on? A. Right.

Q. How do you know it wasn't taken over before that?

A. I had no use to, there was no power.

Q. And you have a note about when the power was turned on? A. That is right.

Q. You are positive about that? A. Yes.

The Court: Counsel for defendant may examine.

(Testimony of K. D. Bradley.)

Further Recross-Examination

By Mr. Butcher:

Q. What did you use the power tools for?

A. There was a power Skill saw used for cutting out the dimensions for the house.

Q. And you needed that to cut the forms for the basement to put in the concrete, didn't you?

A. That again?

Q. You needed that for your forms and your construction generally?

A. Well, all the floor joists and all the blocking and rafters—jack rafters—everything had to be cut out.

Q. There was none of that construction then that occurred [127] until after the Skill saw got there?

A. That is right.

Q. No construction occurred until after the 7th day?

A. The forms were built to form the concrete form.

Q. What did you use to cut those out with?

A. Very little cutting to that.

Q. What kind of forms do you use for a concrete floor?

A. I believe they used 2 by 6 on the sides and ends and then they used riders through there, I believe were 2 by 4's.

Q. Those had to be cut, did they not?

A. They might have to be cut off square at the end.

(Testimony of K. D. Bradley.)

Q. Does your little book show anything about when the construction—you testified that the lumber arrived there on the 3rd, now does your little book show the date the first material started to be cut up and put into the property?

A. It shows that the concrete was poured for the floor of the building on May 5th, prior to that there would be cutting of 2 by 6's and a little shiprock and just enough stuff to lay out a building.

Q. But very little of that and you didn't need the power tools?

A. Didn't need a power saw because it would be all straight out cutting.

Q. Don't you use it for everything after you get going in the construction of a building?

A. In using a power saw they generally use a template and then [128] they cut maybe 40 or 50 pieces the same size or some measure, maybe ten pieces or maybe five pieces.

Q. Except for a small amount of cutting then the primary construction didn't occur until the 7th?

A. No, sir, it wasn't necessary to use a power saw.

Q. And this small amount of cutting could have been done in a small amount of time on the fifth, could it not?

A. Yes, sir.

Q. I believe you testified that in connection—

Mr. Butcher: Your Honor, in order to ask this question I am going to have to refer back to this tool box and we have finished with the witness on that subject. Mr. Grigsby has called him back. Is the examination limited to the scope—

(Testimony of K. D. Bradley.)

The Court: If something is overlooked Counsel may go into it.

Q. (By Mr. Butcher): This tool box, Mr. Bradley, I believe you testified had a shovel and axe and wrecking bars, is that right?

A. I wouldn't swear as to just exactly what tools were in there except that it did have the Skill saw in there and the power sander.

Q. And you testified there was a shovel in there?

A. Miscellaneous other stuff in there—extension cords.

Q. And an electric sander. What is the size of the electric sander? [129]

A. I couldn't tell you the exact dimensions of it. It is a twirler sander.

Q. 12 inches high and 12 inches long?

A. I wouldn't venture to say.

Q. You are a man who has had a great deal of experience in this field, what are the general dimensions of a sander?

A. It would be pretty hard to say on that because there are different makes of different cases.

Q. You know the one they had in this case; you know that, don't you?

A. I would say approximately 12 inches long and 4 inches in diameter.

Q. And how big was the skill saw?

A. It was what was considered a 6-inch. I believe it was a 6-inch.

Q. Has a 6-inch blade?

(Testimony of K. D. Bradley.)

A. I might be mistaken but it wasn't over a 6.

Q. And the rest of the saw, the guard surrounds that and is built up over the motor?

A. Yes, regular Skill saw, Black & Decker.

A. And that was in this box too; that was in this box?

The Court: Pardon me. I have the greatest difficulty in hearing counsel. I am straining all the time to get it and I would like to make it easy to hear.

Mr. Butcher: Am I speaking loud enough for you? [130]

The Court: Yes.

Q. (By Mr. Butcher): And besides that there was miscellaneous cord and other items in the box?

A. Right.

Further Redirect Examination

By Mr. Grigsby:

Q. Will you give me the dimensions of that box again?

A. Well, that would be pretty hard to just say. That box was made in '43 for me and if I remember the dimensions correctly it was 36 inches long, it could have been maybe 40, but I don't think it was over 36. And if I remember that box right it was approximately, oh, say 20-24 inches wide and it wasn't as high as a chair quite, I would say.

Q. About 17 inches. Have you got it yet?

A. It doesn't belong to me, it belongs to Smith.

Q. Do you know where it is? A. Yes.

(Testimony of K. D. Bradley.)

Q. Where is it?

A. Well, before the big snow came it sat on lot 9, block 3 in the Saxon Subdivision.

Q. And as far as you know it is there yet?

A. Well, the last time I was out there there was no tracks over there that hauled it away.

Mr. Grigsby: That is all. [131]

The Court: Any further examination?

(No response.)

The Court: You may step down.

(Witness excused.)

Mr. Grigsby: Call Mr. Baxley.

A. L. BAXLEY

called as a witness herein, being previously duly sworn, resumed the stand and testified as follows:

Further Redirect Examination

By Mr. Grigsby:

Q. Mr. Baxley, you testified before I believe that your first day's work out there as a carpenter was May 3rd? A. That is right.

Q. Were you out there the day that the first lumber arrived? A. Yes, sir, I was.

Q. On what day was that?

A. It was on May 3rd.

Q. What did that lumber consist of, if you remember?

(Testimony of A. L. Baxley.)

A. As I remember that was shiplathe, 2 by 6's and 2 by 8. That came in two truck loads.

Q. You mean the shiplathe came in two truck loads?

A. No, the entire lumber, the shiplathe was on one load.

Q. Now with reference to a tool box that was used by the carpenters, do you remember that? The tool box that was used by the carpenters to put their tools in?

A. Yes, I do. [132]

Q. And what was the size of it?

A. Well, they were two different boxes with tools in them later.

Q. I mean the one that came from the Seifert apartment?

A. That was a quite large box. I would say it was five and one-half by six feet in size.

Q. And how high was it from the way it sat on the ground?

A. That was approximately three feet high.

Q. Was the lid on?

A. Yes, there was a lid on it.

Q. Do you know when that arrived on the Cutting property?

A. I couldn't state the exact date, no.

Q. Was it there on the 1st of May?

A. No, sir, it was not.

Q. Was there any tool box?

A. There were not.

Q. On the 1st of May?

A. No, sir.

(Testimony of A. L. Baxley.)

Q. And do you know when the first beam or post was put in the basement such as Mrs. Cutting described, was it one on which she posted a notice?

A. That I couldn't say the exact date, no, because I wasn't the man who sat the post in there.

Q. Do you know what was the first work done on that basement after the excavation? [133]

A. We sat the forms and poured the flooring.

Q. And you took part in that?

A. I did, yes, sir.

Q. And the first day you worked was it the 3rd?

A. Yes, sir.

Q. Was there any post there at that time?

A. There were not.

Q. And how long after that was there a post such as described by Mrs. Cutting?

A. That wasn't put there until after the sub-flooring was on.

Q. How long would that be?

A. Well, I would say that must have been around approximately the 10th or 12th of May.

Q. Now, Mr. Baxley, at any time when you worked on that job did you ever see any notice of liens or notice of non-liability for a lien?

A. I did not.

Q. Anywhere on the premises?

A. I did not.

Q. After that tool box was placed there did you have occasion to go to it every day?

A. I did.

(Testimony of A. L. Baxley.)

Q. If there had been a notice there such as has been put in evidence here would you have seen it?

A. I would, yes. [134]

Mr. Butcher: I object to that.

The Court: Overruled.

Q. (By Mr. Grigsby): I will hand you this paper, did you ever see such a paper as that anywhere on the premises? A. I did not.

Q. If that had ever been on that tool box would you necessarily have seen it?

A. I would have, yes.

Q. If you had seen it would you have continued to work there? A. Absolutely I would not.

Q. Did you work in the basement?

A. Yes, sir, I worked some in the basement.

Q. Did you ever see one like that in the basement? A. I did not.

Q. Did you handle the lumber after it was brought out there with the other men?

A. I helped to handle it, yes, sir.

Q. Did you ever see such a paper on that lumber pile? A. No, sir, I did not.

Q. On any lumber pile? A. No, sir.

Q. Or any place? A. No, sir.

Q. Or hear of one? [135] A. No, sir.

Mr. Grigsby: That is all. Just a minute.

Q. Do you know how long after you had been working before the box that has been described as similar to a piano box was moved on to the Cutting property?

(Testimony of A. L. Baxley.)

A. I couldn't name the exact date, no, but it was quite sometime after the structure had started.

Q. Were you there when the furniture arrived at the Seifert home? A. Yes, sir, I was.

Q. And was it sometime after that?

A. Yes.

Q. A week?

A. I would say it was a week or more.

Mr. Grigsby: That is all.

The Court: Counsel for defendant may examine.

Further Recross-Examination

By Mr. Butcher:

Q. Mr. Baxley, you stated you went to work there on the 3rd? A. That is right.

Q. And on the third arrived these various loads of lumber? A. Yes, sir.

Q. And in answer to Mr. Grigsby's statement was there any box there on the 1st you said "Absolutely not"? A. There were not. [136]

Q. And there was no lumber there on the 1st?

A. No, sir.

Q. And you didn't go to work until the 3rd?

A. That is right.

Q. How do you know there wasn't any lumber there on the 1st or a box?

A. Because I was there doing the excavation.

Q. Were you working then?

A. I were not.

(Testimony of A. L. Baxley.)

Q. You were doing the same thing as Mr. Bradley was doing—watching, is that correct?

A. That is not correct.

Q. What were you doing there?

A. I was merely helping Mr. Smith stake out the ground before the excavation started, without any cost, hauling him in my car back and forth.

Q. When did he stake that ground out, do you recall?

A. Not the exact date.

Q. You don't have a little book?

A. I do not carry any book.

Q. You don't carry any book. Now I believe you testified that if you had seen such a notice, which you didn't of course, that you wouldn't have worked there any longer, is that correct?

A. That is right, I would have not worked any more until I found out what it was all about. [137]

Q. Did Mr. Smith tell you that he had a contract with Mrs. Cutting in which he was to construct the building and receive the money afterwards?

A. That is right.

Q. And that he made a deal with you whereby you were to receive a 10c bonus for waiting for your money until afterwards?

A. That is right.

Q. And did you not know as an independent contractor Mr. Smith was responsible for the bills?

A. I did not.

Q. You didn't know that?

A. No.

Q. Have you ever worked with Mr. Smith before?

A. No, sir.

(Testimony of A. L. Baxley.)

Q. Have you ever worked with another independent contractor? A. Lots of them, yes.

Q. And you have worked with lots of them here in Alaska? A. Not in Alaska.

Q. Outside? A. Outside, yes.

Q. And from that experience don't you know an independent contractor usually assumes responsibility for the debts? A. Not always.

Q. And don't you see those notices posted?

A. I do not. [138]

Q. Have you ever seen those notices posted?

A. No.

Q. No place? A. No, sir.

Q. You have always worked for independent contractors?

A. Yes, outside of the government.

Q. And those contractors had jobs on other projects—other people's projects?

A. That is right.

Q. And you never saw any of those notices?

A. Not a one.

Q. And you never saw one on the Cutting property?

(No response.)

Q. You never saw one until you saw this one?

A. That is right.

Further Redirect Examination

By Mr. Grigsby:

Q. Do you recall when the green box belonging to Bradley was brought there?

(Testimony of A. L. Baxley.)

A. I beg your pardon?

Q. Do you recall when the green tool box belonging to Bradley was brought to those premises?

A. No, I don't recall the date.

Q. Do you know how long it was after the 1st of May?

A. Well, it was a week or so afterwards because the electricity [139] hadn't been turned on yet.

Mr. Grigsby: That is all.

The Court: That is all.

(Witness excused.)

Mr. Grigsby: Call Mr. Rankin.

EDWARD RANKIN

called as a witness herein, being first duly sworn, testified as follows:

Further Redirect Examination

By Mr. Grigsby:

Q. State your name?

A. Edward Rankin.

Q. Did you state your name? A. Yes.

Q. Will you repeat it?

A. Edward Rankin.

Q. Mr. Rankin, I believe you testified before that you worked on that Cutting job for Russell Smith from the 17th of May to sometime in June?

A. Until the 12th of June, that is right.

Q. During that time did you ever see any

(Testimony of A. L. Baxley.)

notice—I will show you this paper, did you ever see such a paper such as that out on those premises?

A. No.

Q. Do you remember a tool box out there which had been made [140] out of a former piano box?

A. Yes.

Q. Is that where you kept your tools?

A. Yes.

Q. Did you go there every day?

A. Every day.

Q. If there had been such a notice as that posted on that tool box would you have seen it?

A. Absolutely.

Q. And would you have worked there if you had seen such a notice?

A. No, I would have questioned it at least, I know.

Q. Was any such a notice ever called to your attention anywhere on the premises? A. No.

Q. Let's see, what was the last day you worked?

A. June 12th.

Q. You weren't there when that tool box was first brought to the premises?

A. No, it was there when I came.

Q. What was being done when you got there?

A. Well, I started May 17th and I started right on the subfloor that day.

Q. The subfloor, you mean the floor to the basement?

A. The basement is in and the floor joists were up and I [141] started on the subfloor that day.

(Testimony of Edward Rankin.)

Q. And did you observe the joists?

A. Yes, sir.

Q. The support posts?

A. No, not that day, but I was in the basement during the day and saw the posts, yes, walked around it.

Q. Would you have seen such a notice on any of those posts?

A. I would have seen one, yes, if there was one.

Q. Was there one there?

A. I did not see one, no.

Mr. Grigsby: I think that is all.

The Court: Counsel for defendant may examine.

Further Recross-Examination

By Mr. Butcher:

Q. Mr. Rankin, I will just ask you a couple of questions. You didn't start there until May 14th?

A. May 17th.

Q. And you don't know what was posted there when that job was started, do you?

A. What do you mean?

Q. Of your own knowledge you don't know whether there was any posting of notices?

A. I didn't see any.

Q. You didn't see any from the 17th on?

A. Yes, I saw the building permit. Yes, I saw the plumbers' [142] permit and I saw the electrician's permit.

Q. You didn't see any claims for liens?

A. No.

(Testimony of Edward Rankin.)

Q. Notices for claims? A. No.

Q. Notices of non-responsibility? A. No.

Q. Did you—you didn't see anything like that?

A. No.

Q. What was your particular job?

A. General construction.

Q. Carpenter? A. Yes.

Q. Construction? A. Yes.

Q. And you say you would have discontinued working had you seen such a notice? A. Yes.

Q. Did you not enter into an agreement with Mr. Smith whereby you would have waited until the whole job was finished until you looked for your money? A. Yes, that is right.

Q. And for that you would have received a 10c bonus? A. Yes.

Q. And you knew Mr. Smith was going to pay according to his [143] promise, did you not?

A. Mr. Smith—the way I got it was Audrey Cutting would have paid or we would get our money when the job was done.

Q. You would get your money from Mr. Smith?

A. And I read the contract between her and Mr. Smith.

Q. You knew you were to get your money from Mr. Smith, is that correct, she was to pay Mr. Smith?

A. I was to be paid when the job was done.

Q. By Mr. Smith or Mrs. Cutting?

A. I wouldn't care who I got it from.

(Testimony of Edward Rankin.)

Q. You read the contract? A. Yes.

Q. You remember it saying she would pay her \$9800 and he would be responsible for any debts?

A. I can't specify any line in that contract, no.

Q. Then you are telling us that you were looking to Mrs. Cutting for your pay? A. Yes.

Q. And if you had seen that notice then you would have quit right then? A. Yes.

The Court: Any further examination.

Further Redirect Examination

By Mr. Grigsby:

Q. In other words, what you mean to say is that you understood [144] from Smith that he couldn't pay you until Mrs. Cutting paid him?

A. Yes.

Mr. Butcher: That question is entirely leading.

The Court: Objection is sustained.

A. That is what I meant.

Q. (By Mr. Gigsby): If you had seen a notice, with the information you had to the effect that Mrs. Cutting wouldn't be responsible for the bills, what would you have done?

A. I would have walked off the job.

Mr. Grigsby: That is all.

The Court: That is all. Another witness may be called.

(Witness excused.)

Mr. Grigsby: Mr. Bullerdick.

RAY BULLERDICK

called as a witness herein, previously having been duly sworn, resumed the stand and testified as follows:

Further Redirect Examination

By Mr. Grigsby:

Q. State your name?

A. Ray Bullerdick.

Q. You have been sworn in this case?

A. I have.

Q. And I believe you testified you went to work on the Cutting [145] job for Russell Smith on the 15th of May, is that right? A. That is right.

Q. And you quit on the 16th of June?

A. Yes, sir.

Q. And worked every work day during that time?

A. I believe with the exception of one-half day I was off.

Q. Now during that time did you ever see such a notice as the paper I hand you posted anywhere on the premises? A. Absolutely not.

Q. Do you recall a large tool box similar to a piano box in which tools were kept—carpenter tools were kept? A. I do.

Q. Do you know when that arrived on the premises? A. No, I do not.

Q. Was it there when you went to work on the 15th?

A. I recall the box in question being on the

(Testimony of Ray Bullerdick.)

premises but not in use as a tool-room box container.

Q. On the 15th? A. On the 15th.

Q. And after that was it in use—was anything done with it after you first saw it there?

A. What is the——?

Q. Was anything done with it, was it altered in anyway?

A. When I first started to work there in the evening at the close of the working day Mr. Smith said “We have no good place [146] to store the tools.” Your hand tools, hand box, suitcase style. “But in a day or two I will have a box for you with a lid on it and a lock.” So for two or three days, I couldn’t say exactly, it was no concern at the time, I stored my tools under some building materials there, as I remember it it was pieces of roofing or debris of some sort, and I believe one evening I stored them in the basement; that was approximately three nights after I commenced work on the 15th.

Q. And after that where did you store them?

A. This large tool box referred to before.

Q. Have you seen that tool box lately?

A. Yes, sir.

Q. When? A. Nine o’clock this morning.

Q. And did you find the number of it with reference to a shipment? A. Yes, sir.

Q. And write it down? A. I did.

Q. And what was the number on it?

A. The number of the box were stenciled “Box No. 1.”

(Testimony of Ray Bullerdick.)

Q. That was stenciled on the Box No. 1 and then a dash 30?

Mr. Butcher: Your Honor, I object to this question as not being proper rebuttal. The testimony put in by Major Seifert established the delivery of the box and there has been no question [147] raised about his delivery of the box on that date and according to the records which he introduced in evidence that is in those military records and this purports to re-establish that. It is not proper rebuttal.

Mr. Grigsby: This is rebutting the testimony of Mrs. Cutting.

The Court: Objection is overruled.

Q. (By Mr. Grigsby): Did you draw a picture of that box?

A. Yes, I drew that rough sketch.

Q. Did you copy the markings on the box?

A. I did.

Q. Are those the markings you copied?

A. They are.

Mr. Grigsby: We offer this in evidence.

The Court: Show it to counsel for defendant.

Mr. Butcher: May I ask a question or two of the witness?

The Court: Yes, with respect to the admissibility of the exhibit.

Mr. Butcher: This figure here, Mr. Bullerdick, is that a 6?

The Witness: 6 feet, no inches.

(Testimony of Ray Bullerdick.)

Mr. Butcher: And is this box in the position now according to this drawing that it appeared on the property out there?

The Witness: It is in the position but not— It is in [148] the position with reference to the earth but not geographically.

Mr. Butcher: I mean in relation to the earth and the lid was on the end then as you have shown it here?

The Witness: Right.

Mr. Butcher: And if the box were stood up on its end, as if the piano were in it, it would be about 6 feet high?

The Witness: It would have been exactly 6-foot high.

Mr. Butcher: After it was commenced to be used as a tool box it was laid down on its back?

The Witness: In its present position.

Q. (By Mr. Grigsby): How high would it extend above the ground as it was used?

A. I can't remember the exact measurement—three feet or inch or two.

The Court: Is there an objection?

Mr. Butcher: No objection.

The Court: It may be admitted and marked Exhibit RR.

Q. (By Mr. Grigsby): Did I question you with reference to this notice?

A. As to whether I had ever seen it before, sir.

Q. Now, Mr. Bullerdick, this box in length was 6 feet, you say, the longest dimension of it?

(Testimony of Ray Bullerdick.)

A. The greatest dimension.

Q. And did you ever see it upright like a piano would set?

A. No. As I recall it, it was lying at all times regardless [149] of whose premises it was on.

Q. Have you got the dimensions marked on it as to how high it was the way it laid down there, the way you used it for your tools, is it marked there? A. Yes, sir.

Q. What is it?

A. Three feet two inches, the height at the highest point.

Q. Was there any slant where the lid was?

A. A straight line on it as to that dimension of the top deck from this point to this point and a slant from this point from this point to this point of two or three inches as shown. That was done for the purpose of making a little watershed to which a piece of roofing was tacked protecting the tools.

Q. Now you went there every day, did you, to put your tools in the box after it arrived?

A. Yes, sir.

Q. If there had been any notice there of non-lien liability such as the paper I have shown you, would you have seen it on that box?

A. I am sure I would have seen it.

Mr. Butcher: I object. The question was leading.

The Court: The objection is sustained.

(Testimony of Ray Bullerdick.)

Mr. Butcher: I request that a notation be made that it be stricken from the record.

Mr. Grigsby: I believe my question—"If there had been [150] such notice on the box, would he necessarily have seen it?" It doesn't call for any answer——

The Court: The answer may stand.

Mr. Butcher: I misconceived the question. My objection will stand, then, too?

The Court: In deed, sir, and an exception will be noted.

Q. (By Mr. Grigsby): And in that case what would you have done with reference to continuance of working?

A. I would have stopped work until I had determined the legal status of such a notice, as that as might impair our chances of recourse to law in collecting our money.

Q. How did you at that time understand and from whom you were to be paid for your work?

A. I understood that we would receive our money from contractor Smith.

Q. And when?

A. Immediately upon the completion of the project.

Q. Did you have any understanding as to where that money would come from?

A. The name Audrew Cutting—I hadn't met Mrs. Cutting up to that time. I had heard of her but the name, Audrey Cutting, was brought out

(Testimony of Ray Bullerdick.)

many times, but it was understood that she was responsible for the payment of all debts.

Q. If you had seen a notice in which she disclaimed responsibility—— [151]

A. What is it——.

Q. ——then what would you have done?

Mr. Butcher: Your Honor, I believe he should if he is going to say what the notice contained, the responsibility to whom—It doesn't disclaim the payment completely.

Q. (By Mr. Grigsby): For the payment of any work on the property—If you had seen a notice signed by Audrey Cutting to the effect that she would not be *responsibility* for any labor on that property or materials, then what would have been your attitude?

A. What would have been my attitude if I had seen that notice?

Q. Yes.

A. I would have quit working at least until I determined what such a notice—how such a notice would impair my *changes* of collecting my wages through course of law.

Q. Did you ever see such a notice anywhere on those premises?

A. I never did, sir, as I remember.

Q. Or hear of one?

A. I don't believe I ever did.

Q. Don't you know whether you did or not?

A. That goes back for forty years.

(Testimony of Ray Bullerdick.)

Q. On that property?

A. I never saw any on that property, of course not, sir.

Mr. Gribsby: That is all. [152]

Further Recross-Examination

By Mr. Butcher:

Q. Mr. Bullerdick, you went to work there on what date? A. 15th of May.

Q. Construction had been going on for sometime, had it not? A. Yes, sir.

Q. And on the 15th day of May there was no box in which to put your tools? A. No, sir.

Q. And Mr. Smith told you that if you would be patient and put your tools under canvas he would get a box in a few days with a lock on it?

A. In substance that is correct. The word "patient" wasn't mentioned.

Q. And then within a few days he produced a box with a lid on it? A. Right.

Q. And that is the box that you have described in your drawing, is that correct? A. Right.

Q. And from then on you used that box for your tools? A. That is right, sir.

Q. And that box resided in a *declining* position, that is, it was down on the large flat surface and not upright on its end or sides? [153]

A. That is right.

Q. That was all the time you saw that box that you have drawn the picture of?

(Testimony of Ray Bullerdick.)

A. That is right.

Q. Had there been another box there on the first day of May or the third day of May standing in an upright position you wouldn't have known anything about it, would you?

A. No, I am sure of it, I hadn't been there until the 15th. I passed by the job a time or two but that was all, and chatted with the boys, maybe.

Q. You hadn't had any plans to work on the project at that time, had you?

A. Not at that time.

Q. So, from the first day of May until the 15th if there were a large box standing on the rear of the lot you wouldn't have seen it, would you?

A. Not likely.

Q. Mrs. Cutting could have posted such a notice on such a box and you wouldn't have seen it during that time? A. That is right.

Q. And the only box you know anything about is this box you have drawn a picture about?

A. That is the only box that I know anything about that could be called much of a box.

Q. Now, Mr. Bullerdick, you have testified what you would [154] have done if you had seen such a notice as Mr. Grigbsy termed it "A notice which stated that Mrs. Cutting wouldn't be responsible for any payment on the labor and materials on the project," if you had read such a notice you would have quit the job until you asserted your legal status? A. Quite right, sir.

(Testimony of Ray Bullerdick.)

Q. Is that what you testified? Suppose you had seen a notice which said "Be it known that I, Audrey Cutting, guardian of Sylvia Henderson..." This is Defendant's Exhibit No. 102. "...a minor child, of Anchorage, Alaska, will not be responsible for any liens or bills for the building or construction of a home located on lot 2, block 37 D, South Addition, Anchorage, Alaska. On the 20th day of April, 1948, a contract was entered into by and between Audrey Cutting and Russell W. Smith, contractor, to build a house located on Lot 2, Block 37 D, South Addition, Anchorage, Alaska, according to specification as covered by contract." Now, you knew that there was a contract, did you not, with Mr. Smith between Cutting and Smith?

A. I understood there was, yes, sir.

Q. And I believe you testified to the other day that under the terms of that contract no payment was to be made until the house was delivered completed, is that not correct? You knew that?

A. I believe that is correct, Mr. Butcher.

Q. And you entered into an agreement with Mr. Smith that you [155] were to accept a 10-cent bonus for waiting for your money until after the house was completed?

A. That is right.

Q. Now, if you had seen a notice which stated that Mrs. Cutting had entered into a contract with Mr. Smith for the construction of the house would you have walked off the job?

A. If I had of what?

(Testimony of Ray Bullerdick.)

Q. If you had seen a notice which stated that Mrs. Cutting had entered into a contract with Mr. Smith to build this house, would you have walked off the job?

A. If I had seen a contract between Mrs. Cutting and Smith?

Q. No, if you had seen a notice which stated that a contract had been entered into would you have walked off the job?

A. Why should I? Was there any reason why I should?

Q. No, except this notice says both—says she shall not be responsible and says she has entered into a contract. That is all.

Mr. McCarrey: I would like to query Mr. Bullerdick pertaining to the box.

Further Redirect-Examination

By Mr. McCarrey:

Q. Was this box located upon the lot in position to the house in the relative position to the house?

A. When I first arrived on the job, Mr. McCarrey?

Q. Yes. [156]

A. It was approximately half-way—half and half on the two properties. The box, as I recall it, would come somewhere near, probably, the line would come somewhere close to dividing the box. I wouldn't say which side it may have favored.

Q. Was it up against the Seifert house?

(Testimony of Ray Bullerdick.)

A. No, it wasn't up against it.

Q. Was it up against the telephone post or any post of any kind? A. I don't recall.

Q. Was the box so you could walk around it all the way around? A. I believe it was.

Q. Did you ever have occasion to walk clear around the box? A. Possibly.

Q. Do you know whether you did or not?

A. No, I couldn't answer that exactly.

Q. At any time did you see this particular notice upon that box? A. Where is it?

Q. This notice which was shown to you?

A. Did I ever see that on the box?

Q. Yes.

Mr. Butcher: I wonder if counsel is not covering exactly the same territory as previously covered.

The Court: I think so.

Mr. McCarrey: That is all. [157]

The Court: Any further cross-examination?

Mr. Butcher: No.

The Court: You may be excused, Mr. Bullerdick.

(Witness excused.)

The Court: The hearing will be continued. The court stands adjourned until ten o'clock tomorrow morning.

(Whereupon, at 5 o'clock, p.m., the trial was continued until 10 o'clock, a.m., the following morning, Tuesday, February 14, 1949). [158]

Tuesday, February 15, 1949

The Court: Plaintiffs may call a witness in rebuttal.

Mr. Grigsby: Mr. Bell.

ARDEN BELL

called as a witness herein, having previously been duly sworn, resumed the stand and testified as follows:

Further Redirect Examination

By Mr. Grigsby:

Q. Mr. Bell, you have been sworn?

A. That is right.

Q. I believe you stated you went to work on the property in question, being the house built by Russell Smith for Audrey Cutting, on the 3rd of May? A. Right.

Q. That was your first day's work as a carpenter there? A. Yes, it was.

Q. I will ask you whether on that day there was any lumber on the place?

A. Not 'til in the afternoon.

Q. On the 3rd of May? A. 3rd of May.

Q. Were you around that place before the 3rd of May? A. No, I wasn't.

Q. Did you witness the first delivery of lumber there? A. Well, I was on the job, yes. [163]

Q. Did you go there the morning of the 3rd of May? A. I did.

Q. Was there any lumber there then?

A. No, there wasn't.

(Testimony of Arden Bell.)

Q. Any pile of lumber? A. No.

Q. Now you heard the testimony that has been given in this case, all of it?—

A. Yes, I have.

Q. —with reference to a box that was used for tools by the carpenters, that was obtained from Seifert's place. Do you know when that was brought on to the Cutting place?

A. Well, I would say about ten days after I went to work—ten or eleven days after I went to work, or a week.

Q. Was there any tool box on the place except what you carried on, perhaps your own tools or the other carpenters, on the 3rd of May?

A. No.

Q. Did you hear the testimony about this box that was brought by Bradley? A. Yes.

Q. And used for the same kind of tools. Do you know when that was brought there?

A. It was brought as soon as they hooked up the power for their saw. They brought their saw in that box—the Skill saw. [164]

Q. That wasn't there the 3rd of May?

A. No.

Q. Was there any box used as a general tool box on the 3rd of May by the various carpenters?

A. No, there wasn't.

Q. I call your attention to this note, this paper here, which is Defendant's Exhibit 102, did you ever see such a paper as that anywhere on the

(Testimony of Arden Bell.)

premises where that residence was being constructed? A. No, I did not.

Q. Did you ever see such a paper as that on a tool box or any tool box? A. I did not.

Q. If it had been on that box——

Mr. Butcher: Objected to as leading.

Q. (By Mr. Grigsby): If it had been——

Mr. Butcher: It suggests the answer.

Q. (By Mr. Grigsby): If it had been on that box that was brought from the Seifert premises would you have necessarily seen it?

The Court: Wait a minute. Does counsel object?

Mr. Butcher: Yes, as leading.

The Court: Overruled. [165]

Q. (By Mr. Grigsby): Would you necessarily have seen it? A. I would.

Q. After that box was brought there you used it every day? A. I used it several times a day.

Q. Did you ever see such a notice on the premises? A. I did not.

Q. Were you on all parts of the premises?

A. I was.

Q. Were you aware when you went to work of a contract between Audrey Cutting and Russell Smith?

A. Yes, I was aware they had a contract.

Q. You have testified you had an agreement to wait for your wages until the building was completed? A. That is right.

Q. And if you had known or seen a notice from

(Testimony of Arden Bell.)

Audrey Cutting signed by her on the premises that she wouldn't be responsible for your pay, what would you have done?

A. Well, I would have looked into it right away. I wouldn't have worked any more until I found out.

Q. Did you ever know when you went to work or while you were working of Sylvia Henderson having any interest in the property, or hear of the daughter?

A. No, I don't believe so.

Mr. Grigsby: That is all.

The Court: Counsel for defendant may examine.

Further Recross-Examination

By Mr. Butcher:

Q. What day did you say you went to work there? A. May 3rd.

Q. The same day as Mr. Bradley?

A. Yes, the three of us.

Q. Were you around there any time prior to May 3rd? A. No, I was not.

Q. Mr. Bell, you stated you had an agreement with Mr. Smith whereby you were going to wait for your money until he had completed his contract?

A. That is right.

Q. And in consideration of that waiting you were to receive a ten-cent bonus? A. That is right.

Q. And you knew you were going to receive your money from Mr. Smith, did you not?

(Testimony of Arden Bell.)

A. I was to receive the money, yes, from Mr. Smith.

Q. You didn't look to Audrey Cutting for your money, did you?

A. In a way, he couldn't pay until she paid him.

Q. But that wasn't part of your contract? You had no contractual relations with Mrs. Cutting, did you? A. No.

Q. Just with Mr. Smith? A. That is right.

Q. Mr. Grigsby asked you if you had seen a notice stating that Mrs. Cutting was not responsible for the debts, asking you what you would have done and you said you would have investigated immediately to find out what your rights were, and wouldn't have worked until you had them ascertained, is that correct? A. That is right.

Q. Even though you were looking to Mr. Smith for your money? A. Absolutely.

Q. And if that notice had further stated that Mrs. Cutting had a contract with Mr. Smith, would it have still caused you to discontinue your work?

A. It would.

Q. It would have?

(No response.)

Q. Now, when you went there on the 3rd, did you see any kind of a tool box around there of any size? A. I did not.

Q. Did you see any large packing boxes?

A. No, there was none.

Q. No large packing boxes on the property?

(Testimony of Arden Bell.)

A. None.

Q. When did you see the first large box?

A. Well, as I say—the first box, you mean?

Q. The first large box you saw of any kind?

A. There was only one large box ever there. That was the [168] piano box brought from—to be used for a tool box.

Q. Didn't you ever see this box that has been described as three feet long and forty inches wide, and holding power drills, Skilsaws and sanders and wrecking bars and shovels?

A. Yes, I did, but I wouldn't call that a large box.

Q. Would call that a large box. Are you familiar with a notice of non-responsibility? Have you ever seen one before? A. Never have.

Q. Never have seen one anywhere. Have you been in this business a long time?

A. About 35 years.

Q. And you have worked for contractors before?— A. Yes.

Q. —who worked on buildings and private projects?

A. Well, mostly on large contracts, about the largest in the world—dams and Pearl Harbor.

Q. Have you worked on residences and buildings?

A. Well, not as much as I did the other.

Q. You have done work, though? A. Yes.

Q. On many occasions? A. Yes, I have.

(Testimony of Arden Bell.)

Q. And you have never seen one of these notices?

A. Never have.

Q. Were there notices posted around the property of other [169] kinds?

A. Yes, there was.

Q. What were those notices?

A. Permits—building permits.

Q. Do you recall what that permit said?

A. Well, I don't recall just how it was worded.

Q. Do you know who signed it?

A. Russell Smith.

Q. Signed by Russell Smith? A. Yes.

Q. That was the permit permitting Russell to build the house? A. Yes, I imagine so.

Q. Were there any permits put up there by Russell Smith stating he was the contractor?

A. That I couldn't say, I don't believe.

Q. You never saw any of those notices?

A. No.

Q. Do you recall them putting up a pole in the rear of the house to which they attached the electric wires? A. Yes.

Q. Do you remember seeing any notices on that pole?

A. Seems to me like at one time there was an electric permit or something on that.

Q. An electric permit?

A. Or something pertaining to that at first. [170]

Q. You don't remember what it said?

A. No.

(Testimony of Arden Bell.)

Q. Do you ever remember seeing Mr. Bradley around there, day after day? A. Yes, I do.

Q. Most of the day?

A. Well, at first he was there, I would say, most of the day.

Q. At the first part of the job?

A. That is right.

Q. Did he do any work there?

A. Well, I wouldn't say he done any work. He just helped, like, if we moved lumber or anything, he might take a hand in it. He didn't actually do any work for money.

Mr. Butcher: That is all.

Further Redirect-Examination

By Mr. Grigsby:

Q. Mr. Bell, did you hear Mrs. Cutting's testimony with reference to posting one of those lien notices on a post in the basement? A. I did.

Q. Do you know when the first post was erected in the basement?

A. Oh, let's see—basement was poured, I think, two days or so after I went to work. That would be after May 3rd. That would make it about the 5th.

Q. What was done on the 5th?

A. No, then the blocks were put up and the floor joists put in and a temporary post put in. Now, that was several days afterwards. Now, that was a temporary post put in, and that was removed.

Q. How long was it, after you went to work, before there was any post put in?

(Testimony of Arden Bell.)

A. Well, I would say about 6 or 7 days, something like that.

Q. Did you ever see any notice on any post in the basement? A. I did not.

Q. You worked in the basement?

A. Well, I was in and out of the basement only at first.

Mr. Grigsby: That is all.

The Court: Any further cross-examination?

Mr. Butcher: That is all.

The Court: Mr. McCarrey.

Further Cross-Examination

By Mr. McCarrey:

Q. Mr. Bell, in answer to one of Mr. Grigsby's questions, you answered there was no pile of lumber, is that correct? A. You mean——?

Q. On the morning of May 3rd?

A. No, there was none.

Q. Now, was there any lumber there at all, Mr. Bell, of any kind?

A. Not when I went to work. [172]

Q. I believe you stated that you knew about a contract between Mr. Smith and Mrs. Cutting, is that correct?

A. Well, all I know is what they told me.

Q. Did you ever see that contract?

A. I did not.

Q. Did you ever know who owned the land upon which the house is being built?

A. I never knew at all.

(Testimony of Arden Bell.)

Q. Now, calling your attention to the little green box which Mr. Bradley testified to, did you ever see a notice upon the little green box?

A. I never did.

Q. And I believe you testified that you never saw a notice upon the big piano box, is that correct?

A. That is correct, never did.

The Court: Any further cross-examination?

Further Recross-Examination

By Mr. Butcher:

Q. You state that there was no lumber there on the 3rd?

A. I say when I went to work on the 3rd.

Q. You mean, early in the morning?

A. (No response.)

Q. There was some later on that day?

A. There was some came in that afternoon. I couldn't say what it was. [173]

Q. So it was there that evening?

A. There that evening.

Q. There the evening of May 3rd?

A. That is right.

Q. And it was put in two piles, is that correct?

A. Well, as I recall right, there was two loads came in and there would be two piles.

Mr. Butcher: That is all.

The Court: That is all, Mr. Bell. Another witness may be called in rebuttal.

(Witness excused.)

Mr. Grigsby: We rest.

Mr. Kay: May we have a one-minute conference over here?

The Court: Very well, go ahead.

Mr. Kay: Your Honor, we would like to respectfully request a ten-minute recess.

The Court: The Court will stand in recess until ten minutes of eleven.

(Short recess.)

The Court: Counsel may proceed.

Mr. Butcher: The second amended answer which I filed yesterday contains an incorrect statement regarding the cost of the Russell Smith contract. It says \$9500 instead of \$9800, and I have corrected the copies here that I have.

The Court: Without objection the \$9500 figure may be [174] changed by the Clerk to \$9800, and I will remind the other counsel that replies are to be filed within two days from yesterday.

Court now stands in recess until 10:15.

(Short recess.)

The Court: Any further rebuttal testimony?

Mr. Grigsby: We rest.

Mr. Butcher: Defendants rest.

The Court: All parties rest. Are counsel ready to proceed now with the argument?

Mr. Butcher: I have a couple of motions that I would like to be heard on.

The Court: You may proceed, Mr. Butcher.

Mr. Grigsby: What is the motion here?

Mr. Butcher: Motion to dismiss because of failure—motion to dismiss on the ground that the complaints fail to state a cause of action.

* * *

The Court: Do you care to be heard further, Mr. Butcher? The motion is denied.

Mr. Butcher: May I have an exception.

The Court: Does counsel care to proceed now with argument?

Mr. Butcher: I have another motion, Your Honor.

Mr. Kay: That motion is denied as to all parties?

The Court: All of the lien claims, as I understand, and therefore being denied covers all of the lien claims and the various complaints and the complaints of intervention. The motion, however, the question of jurisdiction, was never waived and defendant has a right to raise it at any time if he can during the main argument.

Mr. Butcher: Your Honor, none of the liens, at least none that I have examined, have contained the name of Sylvia Henderson and Ketchikan Spruce. I have the claim of lien attached as Exhibit "A" on the Ketchikan Spruce bills and I find out that Audrey Cutting, Russell Smith and Ralph R. Thomas are listed and not Sylvia Henderson.

Your Honor, the name, Sylvia Henderson, who obviously is a minor, has appeared in this case in

numerous instances [188] through references in the complaints, through actually being named in the complaint as a minor, but in no case that I have been able to find has been named as defendant in the lien claims. However, I wish to call the Court's attention at this time that in spite of the evidence or together with the evidence which has been presented in this case that Sylvia Henderson is a minor; that Sylvia Henderson is not a ward of a guardian; that she has no guardian; and that she had no guardian during any of the times contemplated by this action during any of the times the work was furnished and up until the present time as far as I know.

The Court: Don't you appear for Miss Henderson?

Mr. Butcher: Your Honor, I am going to come to that in a moment. There has been no action on the part of the Court to authorize an attorney to appear for Miss Henderson and the law as I have been able to find it both in the Code—and I raise this now, Your Honor, because at one time I accepted service from Mr. Grigsby on behalf of Miss Henderson and told him at the time I accepted that I didn't know for sure that I represented her. I think I informed the Court at one time when we were discussing the settling of this that I wasn't certain that I represented Miss Cutting. But I have checked the law and I find the law absolutely forbids a representation of a minor unless that representation is made by the duly authorized legal rep-

representative of the minor, that is, the guardian, and that infant cannot appoint its own attorney, and for the sake of this motion, Your Honor, I am going to cite you several cases which are directly in point and also the cases which hold that any judgment handed down by a court where the guardian by official order of the Court has not consented to the minor being sued or through ordering in the court that that judgment can have no possible effect upon the minor.

The Court: Pardon me, before citing the cases. Was there not an order made here appointing Mrs. Cutting as guardian ad litem for the minor?

Mr. Butcher: Not to my knowledge.

The Court: The Court now makes such an order and the plea may be amended if necessary to conform with that order and to bring Sylvia Henderson into Court. Counsel was in error in not heretofore advising the Court that he did not represent Miss Henderson. I assumed that it had all been arranged.

Mr. Butcher: Your Honor, I didn't know this law and discovered it myself.

The Court: Counsel may proceed.

Mr. Butcher: May I cite, Your Honor, the cases that go to the point of appointing——

The Court: I think I know the law fairly well but I would be glad to have it.

Mr. Butcher: This is the case of * * * And I call your attention, Your Honor, to Wilton on Contracts, Volume 1, that [190] is the large set, sec-

tion 248, page 735, and that particular section, Your Honor, refers to the ability of an infant to select the attorney and also goes very strongly to the point that no judgment at all of any kind can be exercised against an infant who has not been represented by an attorney selected by the guardian.

My request is that Your Honor, which I probably didn't state originally, is that the actions be dismissed insofar as Sylvia Henderson is concerned.

The Court: The motion will be denied. Mrs. Cutting, do you choose Mr. Butcher as the attorney for Sylvia Henderson, a minor, or do you want to get another attorney to represent her?

Mrs. Cutting: No, sir, I believe that it will be quite all right to have Mr. Butcher represent her.

The Court: Mr. Butcher has already represented her, is that not true?

(No response.)

The Court: I think this point comes with ill grace at the end of the trial.

Mr. Butcher: Your Honor, I didn't know it. I bring it only for the point of the record.

Mr. Grigsby: Mr. Butcher appears for Sylvia Henderson and when this amended complaint was served——

The Court: Very disappointing to have this point raised [191] at all. Does counsel care to go forward with arguments at this time?

Mr. McCarrey: I should like to have it continued until two o'clock this afternoon.

The Court: Very well, Court will hear Mr. Grigsby.

Mr. Butcher: Your Honor, may I inquire at this time as to the procedure now in arguments. With so many attorneys involved will all attorneys argue it or will some specific few argue it and what relationships?

The Court: All attorneys will have an opportunity to argue their own particular claims and also within limits the general issues. However, I hope that attorneys will avoid all repetition in presenting the law involved and if counsel for defendants desires to have an opportunity to answer each attorney upon the specific claims presented he may do so.

Mr. McCarrey: Your Honor, I would like to waive reporting as far as argument is concerned.

Mr. Grigsby: I think perhaps the stenographer had better be here in case.

The Court: The arguments will be recorded.

(Whereupon argument by counsel was had.)

(Upon motion of Mr. Kay the Court authorized taking of further testimony on behalf of the claim of Ketchikan Spruce and stated that following the argument he would hear further testimony of Harry Goudchaux and testimony of Lyle Anderson.) [192]

LYLE ANDERSON

called as a witness herein, having previously been duly sworn, resumed the stand and testified as follows:

Further Redirect-Examination

By Mr. Kay:

Q. Would you state your name, please?

A. Lyle Anderson.

Q. Are you the same Lyle Anderson who has previously testified and been sworn in this case?

A. I am.

Q. And you are still under oath in this matter?

A. I am.

Q. Mr. Anderson, in the claim of lien filed by the Ketchikan Spruce Mills, Inc. the lien reads that the name of the owners or reputed owners of said property is Audrey Cutting, Russell Smith and Sylvia A. Henderson, will you state what, if anything, you know concerning the inclusion of Sylvia A. Henderson's name in this claim of lien?

A. I am sorry, I know nothing of it whatsoever. I was out of the town at the time the lien was filed and I never heard of the name until this Court said it during the course of this trial.

Q. During the time that Ketchikan Spruce Mills was supplying material to this Cutting job, did you have any knowledge of [193] any interest owned or claimed by Sylvia Henderson in lot 2, block 37-D in South Addition?

A. None whatsoever.

Mr. Kay: That is all.

(Testimony of Lyle Anderson.)

The Court: Who verified the claim?

Mr. Kay: Harry Goudchaux.

The Court: Very well, counsel for defendant may examine.

Further Recross-Examination

By Mr. Butcher:

Q. Mr. Anderson, when you filed the claim you did have some information, did you not, about who the owners were?

A. Well, as I stated, I was out of town at the time that was filed. Now, if I might outline our procedure in filing these?

Q. Yes, go right ahead.

A. When we file a lien we take the amount of it and the name and turn those over to our firm of attorneys with any other information that we might have regarding that and the liens are made out there and we sign them and the liens are filed. In this particular instance I didn't sign it nor did I ever have anything to do with it. It was done by Mr. Goudchaux.

Q. Did you turn over the information yourself to your attorneys? A. On this one, no.

Q. Where did they get it?

A. Mr. Goudchaux turned it over to them.

Q. They got it from Mr. Goudchaux? [194]

A. Yes.

Q. You know that from what you learned since you came back?

(Testimony of Lyle Anderson.)

A. I left instructions before I left town that there was to be a lien filed and Mr. Goudchaux would take care of it.

Q. And did you make any effort yourself to determine who the owner of the property was?

A. Well, at the time, as per my previous testimony, when I called Mrs. Cutting on the 'phone I stated to her that we would charge the material to her and there was no denial of ownership or responsibility at that time.

Q. But you didn't actually discuss the ownership of the property, did you?

A. I am sorry, I didn't.

Q. You didn't? And you made no other effort to find out who was the owner of the property?

A. No.

Q. No effort? A. No, no occasion to.

Q. You just assumed that Audrey Cutting was the owner? A. That is right.

Q. You never heard the name, Sylvia Henderson, until you came into Court?

A. That is right.

Mr. Butcher: That is all.

The Court: That is all.

(Witness excused.) [195]

Mr. Kay: Harry Goudchaux.

HARRY GOUDCHAUX

called as a witness herein, having previously been duly sworn, resumed the stand and testified as follows:

Further Redirect-Examination

By Mr. Kay:

Q. Will you state your name, please?

A. Harry Goudchaux.

Q. Are the same Hary Goudchaux who has previously been sworn and testified in this case?

A. I am.

Q. You realize you are still under oath?

A. Absolutely.

Q. Mr. Goudchaux, in the notice of lien filed by the Ketchikan Spruce Mills, Inc. the names of the owners or reputed owners of the property in this case are given as Audrey Cutting, Russell Smith and Sylvia A. Henderson, that notice being signed by you on the 19th day of July, 1948, would you state what, if anything, Mr. Goudchaux, you know regarding Sylvia A. Henderson and her inclusion in this notice?

A. I recall talking to either Mr. Baker at the First National or Mr. Johnson at the Bank of Alaska and they told me that Mrs. Cutting was applying for a loan and the name of her daughter, Sylvia Henderson, was in there and——

Mr. McCarrey: Will you talk in the microphone, please? [196]

A. At the time I got ready to file the lien I

(Testimony of Harry Goudchaux.)

talked to either Mr. Baker at the First National or Mr. Johnson at the Bank of Alaska. They told me Mrs. Cutting was applying for a loan and Sylvia Henderson was mentioned as one of the owners of the property, possibly her daughter. No mention was made to me as to her age or anything that would make me believe that she was a minor.

Q. (By Mr. Kay): And, Mr. Goudchaux, did you supply the information to our office from which this claimant lien was written?

A. I gave them the information and I believe I gave it to Mr. Dan Cuddy at the time and suggested that he check on that.

Q. And Mr. Dan Cuddy is a clerk in the office of Cuddy and Kay? A. That is right.

Q. And do you know anything else concerning the name of Sylvia Henderson being included in your claim of lien?

A. That is the only reason, I imagine, for it being included.

Q. Let me ask you whether or not you knew anything or not about Sylvia Henderson claiming an interest in lot 2, block 37-D, South Addition, City of Anchorage, during the time you were supplying materials to this Cutting job.

Mr. Butcher: Objected to as leading.

The Court: Overruled. You may answer.

The Witness: The first knowledge I had of Sylvia Henderson [197] entering into the picture at all was about a day before I filed the lien.

(Testimony of Harry Goudchaux.)

Mr. Kay: That is all.

The Court: Counsel for defendant may examine.

Further Recross-Examination

By Mr. Butcher:

Q. I believe you testified previously, Harry, that you were the bookkeeper for the company?

A. That is right.

Q. You have been there quite a while?

A. That is right.

Q. And you deal with these contractors all the time, do you not? A. Absolutely.

Q. In ordering material, and you take such precautions as you normally do in good business procedure to protect your credits?

A. That is right.

Q. When Russell Smith applied for credit did you inquire from him as to who the materials were for—what job it was?

A. He came in, if I remember correctly, and said that he was going to build a house for Mrs. Audrey Cutting, if I am not mistaken. I told him “Well, Russell, we cannot handle it for you.”

Q. You meant you couldn't extend credit? [198]

A. Could not extend him credit.

Q. And Mrs. Cutting's credit was satisfactory as far as you were concerned?

A. Mrs. Cutting had had an account with us and it had been fairly satisfactory.

Q. Did you make any efforts then, Harry, to

(Testimony of Harry Goudchaux.)

determine whether Mrs. Cutting owned the property or not? A. I didn't at the time.

Q. You didn't at the time? A. No.

Q. When did you make an effort?

A. Just before we filed the lien. Mr. Anderson had talked to Mrs. Cutting and he told me it was okeh to deliver the lumber.

Q. And as far as you, yourself, was concerned you just assumed that it was Mrs. Cutting's property? A. That is right.

Q. And you absolutely made no effort to find out who was the owner? A. No.

Mr. Butcher: That is all.

The Court: That is all.

(Witness excused.)

The Court: Any other testimony?

(No response.)

The Court: Any other testimony in connection with this [199] subject to be offered on behalf of the defendant?

Mr. Butcher: No, Your Honor.

The Court: Is there anything further to be presented to the Court in connection with this case?

Mr. Butcher: Your Honor, I was going to inquire if Your Honor has a copy of the stipulations entered into by counsel at the commencement of the trial. I notice we have a different stenographer and there were stipulations made on the part of most of counsel that they were not seeking personal

judgments against Mrs. Cutting and believing that we would have the same stenographer throughout the trial I made no notation of it and I am wondering now if the Court has the stipulation as to those attorneys seeking personal judgment and those attorneys not for their clients.

The Court: No, I do not recall any written stipulations. The stipulations, as I recall it, were all oral. I think I remember them. As I recall the only two seeking personal judgment were Ketchikan Spruce Mills, Anchorage Sand & Gravel Company and the Concrete Products Company,—Cinder Blocks Products Company—those are the only three that I can recall that asserted any personal claim against Mrs. Cutting.

Mr. Butcher: That was my recollection, too, Your Honor. However, in the course of Mr. Stringer's argument he mentioned the fact that she was personally liable under the contract and I am wondering whether he entered into that stipulation or not. [200]

The Court: I have forgotten. I assume that he would claim a personal judgment against Mrs. Cutting for the amount.

Mr. Butcher: I am wondering, Your Honor, if Mr. Stringer entered into the stipulation. I don't remember.

Mr. Stringer: No, I did not.

The Court: The Court will have to decide that upon the evidence, then.

Mr. Butcher: I wonder if it is possible to get

a copy of the stenographer's record of the stipulation?

The Court: On the question of lien, I have no doubt that the stenographer will be glad to furnish a copy.

Mr. Kay: Your Honor, at this time I would like to renew the motion which I previously made which Your Honor took under advisement or delay for sometime to—I think I would like to make a general motion that my pleading be amended to conform with the proof.

The Court: In what respects? After all, that is too general.

Mr. Kay: In the following respect, that the notice of lien filed by the Ketchikan Spruce Mills, Inc. be amended to include the name of Ralph Russell Thomas as an owner or reputed owner of said property and that paragraph 6 of the—paragraphs 4 and paragraph 6 of each of the two causes of action or each of the two counts, first causes of action in my complaint, be [201] amended to include the name of Ralph Russell Thomas.

The Court: Is there objection?

Mr. Butcher: Yes, Your Honor, I object.

The Court: Objection is overruled and the complaint may be amended on the lien and the claim of lien and the complaints may be amended accordingly.

Mr. Butcher: And may an exception be shown?

The Court: Exception may be noted.

Is there anything further to be presented in connection with this case?

(No response.)

The Court: The decision will necessarily be reserved for a short time. I realize the desirability of having the case determined without any considerable delay and I thank counsel for the thought and study that they have given to the questions of law involved and for their able presentation.

There being nothing further we will adjourn until 10 o'clock in the morning.

(Whereupon, at 3:30 p.m., Wednesday, February 16, 1949, the hearing was closed.) [202]

Certificate

United States of America,
Territory of Alaska—ss.

I, Oren J. Casey, the Official Court Reporter for the District Court of the United States, Third Division, Territory of Alaska, hereby certify the above and foregoing 202 pages to be a true and correct transcript of the proceedings had in the above-entitled matter in said court at the time and place as set forth.

/s/ OREN J. CASEY,

Certified Shorthand Reporter.

Dated at Anchorage, Alaska, this 16th day of July, 1949.

[Endorsed]: No. 12324. United States Court of Appeals for the Ninth Circuit. Audrey Cutting and Sylvia A. Henderson, Appellant. vs. Ray Bullerdick, et al, Appellees. Transcript of Record. Appeal from the District Court for the Territory of Alaska, Third Division.

Filed August 8, 1949.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for
the Ninth Circuit.

[Title of District Court and Causes.]

No. A-5087 and A-5088, Consolidated.

DESIGNATION OF POINTS

The defendants assign the following as the errors of the trial court on which they propose to rely in the above appeal.

I.

That the trial court erred in denying the motion of counsel for defendants to dismiss at the close of the plaintiffs' case on the grounds that the complaints of the original plaintiffs and plaintiffs intervenor did not state good causes of action against the defendants.

II.

That the trial court erred in denying the motion of defendants counsel to strike the lien claims filed by plaintiffs and to dismiss at the close of

plaintiff's case on the grounds that the lien claims did not contain sufficient facts to constitute valid liens against the real property of Sylvia A. Henderson.

III.

That the trial court erred in denying the motions of defendants counsel to dismiss against the defendant, Audrey Cutting, on the grounds that she was neither owner of the property nor agent of the true owner, Sylvia A. Henderson.

IV.

That the trial court erred in amending sua sponte and by judgment the pleadings of plaintiffs to contain essential allegations not previously set forth therein.

V.

That the trial court erred in amending the plaintiffs pleadings sua sponte and by judgment to include defendant Sylvia A. Henderson as a party defendant.

VI.

That the trial court erred in amending sua sponte and by judgment the complaints of plaintiffs sufficient to make good causes of action.

VII.

That the trial court erred in refusing to follow the case of *Russell vs. Hayner*, 130 Federal Reporter p. 90, as to the essential allegations of complaints and lien claims in lien foreclosure suits.

VIII.

That the trial court erred in allowing the lien claims against the real property of an infant, the said Sylvia A. Henderson.

IX.

That the trial court erred in ordering sold by its Judgment the real property of Sylvia A. Henderson, a minor.

X.

That the trial court erred in rendering personal judgment against the defendant, Audrey Cutting, who was neither owner nor agent of the owner of the said real property.

XI.

That the trial court erred in rendering judgment against the real property of Sylvia A. Henderson, when the said Sylvia A. Henderson had not been served personally nor constructively with summons in accordance with the laws of Alaska.

XII.

That the trial court erred in denying the motion to dismiss against Sylvia A. Henderson, at the close of the trial, on the grounds that she was not made a party to the action by personal or constructive service of summons, and as an infant was not before the court through a general guardian or guardian ad litem.

XIII.

That the trial court erred in appointing Audrey Cutting guardian ad litem at the close of the trial by its order nunc pro tunc.

XIV.

That the trial court erred in finding against the evidence, that there was no delivery of the deed of the real property from Ralph Thomas to Sylvia A. Henderson.

XV.

That the trial court erred in finding against the evidence, that Sylvia A. Henderson did not execute a mortgage to Ralph Thomas of said real property.

XVI.

That the court erred in permitting plaintiffs, Ketchikan Spruce Co. to support their case by presenting additional testimony after both plaintiff and defendant had rested, and subsequent to the motion of defendant counsel to dismiss on the grounds of failure to make a prima facia case.

/s/ HAROLD J. BUTCHER,
Attorney for Defendant.

Certified Copy.

Receipt of copy acknowledged.

[Endorsed]: Filed D. C. Territory of Alaska,
August 20, 1949.

[Endorsed]: Filed U.S.C.A., Aug. 29, 1949.

